

No. 12593

United States
Court of Appeals
for the Ninth Circuit.

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 347 to 576)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

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PAUL P. O'BRIEN,

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Southern Division.

PHILLIP S. KAHER

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to
the Court and jury, please?

A. Phillip S. Kafer.

Direct Examination

By Mr. Phelps:

Q. Mr. Kafer, where do you live?

A. Dunsmuir, California.

Q. And how long have you lived there?

A. Practically all my life.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity?

A. Locomotive fireman.

Q. How long have you been employed as a locomotive fireman?

A. May 16, 1941.

Q. Are you what is called a promoted man?

A. Yes, sir. [368]

Q. By that what do you mean?

A. I was promoted to an engineer.

Q. So that you are qualified to act as a locomotive engineer when the work permits?

A. When the work permits, yes, sir.

Q. By that do you mean by the—by seniority, is that correct?

A. Yes, sir.

Q. Now, in December 27, 1948, I take it your seniority did not permit you to work as a locomotive engineer?

(Testimony of Phillip S. Kafer.)

A. At that time I wasn't a promoted man.

Q. You weren't a promoted man and you have been promoted since, is that correct?

A. Yes.

Q. All right. Mr. Kafer, have you ever had any other experience in a locomotive engine other than with the Southern Pacific Company?

A. No, sir.

Q. Now, what division do you work out of?

A. Shasta Division.

Q. And has all your experience been on that division? A. Yes, it has.

Q. And except for recent trips as locomotive engineer all the trips have been as a fireman, is that right? A. Yes, sir.

Q. All the other trips? [369] A. Yes.

Q. Now, then, Mr. Kafer, directing your attention to December 27, 1948, can you tell us whether or not you were acting as a fireman on a passenger locomotive which was involved in an accident in Anderson? A. Yes, sir, I was.

Q. And what was the number of that train?

A. No. 13.

Q. And where did you go on duty?

A. At Dunsmuir.

Q. Where did your run terminate?

A. Gerber.

Q. And who was your engineer?

A. Mr. Stainbrook.

Q. The man that just left the court room?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, do you remember what time you went on duty at Dunsmuir?

A. We were called on duty at 5:10 a.m.

Q. Do you remember the number of cars you had?

A. No, sir, I do not.

Q. You don't have any independent memory of that?

A. No, sir.

Q. All right. Mr. Kafer, when you went on duty at Dunsmuir and from then until the time of the accident, did you have [370] occasion to observe the running of the locomotive and train and determine whether or not the brakes were in good operating condition?

A. Yes, sir; I did.

Q. Can you tell us whether or not they were in proper condition?

A. To my knowledge they were.

Q. You saw nothing unusual about the handling of them?

A. No, sir, I did not.

Q. Worked all right so far as your observation?

A. Yes, sir.

Q. Mr. Kafer, in the running of a locomotive, the duties of a fireman, do they consist of having anything to do with the actual control of the movement of the engine? In other words, what I have in mind, is there any throttle or brake on your side of the locomotive?

A. No, there is not.

Q. So if any conditions are observed by the fireman which require stopping or slowing down, how is that information communicated to the engineer?

A. We call it by voice.

(Testimony of Phillip S. Kafer.)

Q. And then the engineer takes a signal from you in that respect?

A. That is right, yes, sir.

Q. All right, now, in the operation of a locomotive and this particular locomotive this morning, your duties did entail, did [371] include looking out on your side of the locomotive, is that right?

A. Yes, sir, it did.

Q. That would be which side?

A. The left side of the locomotive.

Q. And on this day and as you were approaching the town of Anderson, were you in that position? A. Yes, sir.

Q. And in other words, you weren't running the locomotive? A. No, I wasn't.

Q. Sometimes——

A. Wasn't allowed to run it.

Q. Now, on that day and directing your attention to the accident, approximately what speed was your locomotive running as it was running through Anderson and just before you noticed—withdraw that. I am getting ahead of the story.

Approximately what speed was your locomotive running through Anderson before its brakes were applied?

A. Approximately between 65 and 70 miles an hour.

Q. Do you have a speedometer on your side?

A. No, we do not.

(Testimony of Phillip S. Kafer.)

Q. So that is your best estimate of the speed?

A. Yes, that is my best estimate.

Q. Now, then, in a locomotive of that type, referring to the one that you had on this morning of the accident, who operates [372] the bell?

A. The bell is operated from the fireman's side, or the left side of the cab.

Q. How is that rung, by hand or automatically?

A. It is rung automatically.

Q. Now, on this occasion can you tell us whether or not the bell was ringing as you were going through the town of Anderson and approaching the Howard Street crossing?

A. The bell was ringing.

Q. And where were you, if you remember, when you turned the bell on, if you did?

A. The bell was turned on approximately a quarter of a mile north of the Signal Oil Distributing plant crossing north of Anderson.

Q. Is that Signal Oil?

A. There is a Signal Oil distributing plant there.

Q. And does that appear on this map? Will you step down so that we can look at this map so I will explain it to you, and see if you understand it. In this map we have Howard Street and it isn't marked as such, but this is the Howard Street crossing I am now indicating.

A. Yes.

Q. You recognize that as the first crossing south of the depot or station?

A. Yes, I do. [373]

Q. Now, we have another crossing called the Ferry Street crossing which is north of the station,

(Testimony of Phillip S. Kafer.)

and then there is still another crossing up by the store, the diagram, the parallelogram, indicates a store, North Street; do you recognize that crossing?

A. I recognize the crossing.

Q. Now, is there another crossing in the little hamlet of Anderson and if so, where is that?

A. It would be a little south of this crossing, of the Howard Street crossing.

Q. That would be the direction towards Red Bluff. Does that crossing that you have—do you understand the map now? A. Yes.

Q. You can resume the stand. This crossing you mentioned that this distributing plant is near, does that appear on this map or not?

A. No, sir, it does not appear.

Q. Approximately where is it with relation to the North Street crossing?

A. Approximately a mile north of that North Street crossing.

Q. And are there any other crossings in there?

A. No, sir.

Q. All right. As you approached Anderson, turned the bell on at the point you have already testified to, did you leave it on and when did you turn it off? [374]

A. I left—turned the bell on in that place, as I have said, I turned it off after we had stopped, after the accident.

Q. After you had come to a stop, after the—south of the crossing after the accident?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. And during that intervening time, can you tell us whether or not your personal observation, whether or not it was ringing and working properly? A. It was working properly.

Q. I see.

Mr. Phelps: We have reached 4:00 o'clock. Does your Honor want to adjourn?

The Court: All right. We will adjourn now, ladies and gentlemen, until 10:00 o'clock, and in the interim please bear in mind the admonition I have heretofore given you.

(Whereupon, an adjournment was taken till 10:00 o'clock a.m., Wednesday, December 28, 1949.) [375]

December 28, 1949 at 10:00 o'Clock

The Clerk: Shanahan vs. the Southern Pacific Company, on trial.

Mr. Phelps: Mr. Kafer was on the stand. Will you get Mr. Kafer?

PHILLIP S. KAFER

resumed the stand, previously sworn.

Direct Examination

(Continued)

By Mr. Phelps:

Q. Now, Mr. Kafer, before we adjourned yesterday evening, I believe you had told us about the operation of the bell? A. Yes.

Q. Which is something the fireman does, and that is your job? A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, with reference to the headlight, will you tell us as you were coming out of Redding, Mr. Kafer, were the headlights burning?

A. Yes, they were.

Q. And two headlights or just one?

A. There are two headlights on that engine.

Q. And one—will you tell us what the various—the two types are?

A. The one headlight is called a Mars headlight, which in [376] operation is oscillating or wagging across in front of the engine. The other one is the regular headlight that is held stationary.

Q. All right. Now, proceeding south of Redding and before you came to the train on the siding at Anderson, can you tell us whether or not the headlights were burning?

A. Both headlights were burning.

Q. All right. And with reference to the Mars headlight, was it oscillating or stationary?

A. For the train on the siding it was stationary.

Q. Before you came to the train on the siding was it oscillating or stationary?

A. I put it on stationary position before we came to the train on the siding.

Q. Now, you say you did? A. Yes.

Q. You operated the control that did it?

A. Yes, I did.

Q. Now, then, when that headlight is on stationary, then you have two lights headed directly down the track? A. Yes, you have.

(Testimony of Phillip S. Kafer.)

Q. And can you tell us how long that remained in a stationary position?

A. Approximately till the engine had passed near the end of the train. [377]

Q. Near the end of what train?

A. The train that was in on the siding.

Q. And then after that what did you do?

A. It was put back in the oscillating position.

Q. And was that before or after the accident?

A. Before the accident.

Q. So that at the time of the accident at the Howard Street crossing it was oscillating?

A. The Mars light was oscillating.

Q. Was the other light burning?

A. Yes, it was.

Q. Now, then, Mr. Kafer, directing your attention again to your approach to Anderson, can you tell us whether or not warning crossing whistles were sounded?

A. The warning whistles were sounded, yes.

Q. And can you tell us where that commenced and describe to us how those were sounded?

A. That was commenced a quarter of a mile, a prescribed signal post above the North Street crossing, and continued for each crossing.

Q. And as the—will you tell us whether or not it was continuous from the point you have described north of the North Street crossing down to the Howard Street crossing?

A. Yes, it was continuous.

(Testimony of Phillip S. Kafer.)

Q. And were there any whistles sounded even before that? [378]

A. Yes, there were for other crossings previous to that.

Q. For the crossing—what is the first crossing north of the North Street crossing?

A. That would be at the Signal Oil plant.

Q. And were there any—withdraw that.

Mr. Kafer, as you were coming into Anderson what was the first indication you had that there would be an accident?

A. The car driving up in front of the train.

Q. Approximately, the best you can tell us, where was the car when you first saw it?

A. I could not give you any approximate distance there. It just seemed to have driven up right in front of us.

Q. Was it in motion when you first saw it?

A. Yes, it was.

Q. Did it stop at any time after you saw it?

A. No, it did not stop.

Q. And did you have an opportunity to estimate its speed? A. I did not.

Q. And when you saw that automobile driving towards the crossing, that is, driving towards your track, what did you do?

A. First thing was to holler, "Hold them," to Mr. Stainbrook, the engineer.

Q. Did you do that immediately from seeing it?

A. I did.

Q. Now, will you tell us whether or not Mr.

(Testimony of Phillip S. Kafer.)

Stainbrook [379] immediately applied the brakes?

A. Mr. Stainbrook did apply the brakes immediately.

Q. And the automobile; describe to us, tell us what it did within your view. What did it do?

A. In that short time the automobile just drove up the crossing in front of us, disappeared in front of the engine.

Q. Disappeared from your view before or after the impact? A. Before.

Q. Now, then, after the impact and with the brake stopped in emergency, how far to your best judgment, how far did the train continue on over the crossing?

A. Approximately a half a mile.

Q. And from your experience as an engine man as the situation was then existing and having in mind the track conditions and equipment you had, was that a good emergency stop?

A. I would say it was a very good stop.

Q. Now, then, after the accident and after your train came to a stop, what did you do?

A. We got down and run around the engine to see what had happened.

Q. And did you make any observation at that time with respect to the headlights of the locomotive when you went around to the front?

A. Yes, I did.

Q. And what did you see? [380]

A. The Mars light was oscillating, the regular headlight on, and the bell was ringing.

(Testimony of Phillip S. Kafer.)

Q. And you made an observation then as to the bell, what about that?

A. The bell was ringing.

Q. What did you do after making those observations?

A. We took the door off the pilot of the engine, noting that the air hoses had been broken, and inspected the engine all around.

Q. Did you do anything with respect to the headlights or bell?

A. After inspecting the engine, we climbed back up in the cab, shut off the Mars headlight and shut the bell off.

Q. And was that before or after anybody arrived at the head end of the engine?

A. That was before anybody else.

Q. Now, from your position in the cab on the lefthand side of the locomotive, did you have an opportunity to observe whether or not the wig-wag on the Howard Street crossing was working or not?

A. No, I did not.

Q. Now, as you—I don't know whether we can fix this or not, whether I have asked it, but if I have you can tell me—did I ask you, could you estimate for us the approximate position of your locomotive at the time when you first saw the automobile? [381]

A. Well, as near as I could say would be by the train order post at the south of the station.

Q. South of the station?

(Testimony of Phillip S. Kafer.)

A. Right at the south corner of the station, in other words.

Q. What is the train order post, what is that post?

A. That is a post for giving us, letting us know whether we will receive orders at a certain station along our route.

Q. Is it the post that the orders are posted on or is it the signal showing that there are orders—I don't understand which.

A. It would be the signal indicating that there are orders.

Q. And now then, as you were approaching the crossing, and at that time can you tell us whether or not the warning whistle at that time, approximately at the time when you saw the train for the first time, whether the whistle then was blowing?

The Court: You said the train.

Mr. Phelps: I meant the automobile. If I did, I am sorry. I have a cold and a splitting headache and I can't be completely responsible for what I am saying.

The Witness: Would you state that——

Mr. Phelps: I will reframe the question. Withdraw that.

Q. As you were approaching the crossing there and when you yelled, "Hold it," can you tell us whether or not at that time, if you know, whether or not at that time the crossing [382] whistle was being sounded?

(Testimony of Phillip S. Kafer.)

A. It was being sounded for that approximately right around that time, yes.

Q. And for the other times that you have already told us about? A. Yes.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Kafer, as I understand it, you have been a fireman with the Southern Pacific Company since 1941, is that correct? A. Yes, it is.

Q. And you have been at the Shasta Division all of that time? A. Yes, I have.

Q. Now, have you always been operating in the district from Dunsmuir to Gerber?

A. No, I have not. I have operated on other districts according to my seniority.

Q. How long prior to the accident had you been in the district from Dunsmuir to Gerber?

A. I believe it was in October.

Q. Of 1948? A. '48, yes.

Q. A matter of a couple of months, then?

A. Yes.

Q. And how often did you make the trip from Dunsmuir to Gerber [383] and return?

A. Every other day.

Q. And that was true at the time you mentioned from October till the time of the accident?

A. Yes, it is.

Q. So you passed through Anderson many times, is that correct? A. Yes, I have.

(Testimony of Phillip S. Kafer.)

Q. And you were familiar, were you, with the crossing there in Anderson and the right of way and the general surroundings in the neighborhood of the depot and all? A. Yes.

Q. You estimate the speed of the train to be between 65 and 70 miles an hour when you approached Anderson and Howard Street, isn't that correct? A. Yes, it is.

Q. Was that the normal speed of the train through there?

Mr. Phelps: I will object as to that being incompetent, irrelevant and immaterial as to what the speed was on other occasions.

The Court: Let him answer it.

A. Between 65 and 70 miles an hour would be normal speed.

Q. Wasn't it more often 65 miles an hour speed that you went through there?

A. I could not say that.

Q. You were late this morning? [384]

A. Yes, we were late.

Q. About 25 minutes?

A. I believe it was 25 minutes late out of Redding.

Q. Now, you talked about the two headlights, the Mars headlight and the standard headlight; you operated the headlights, as I understand it?

A. Yes, I did.

Q. When did you see the engine of the freight that was on the west siding?

A. I did not see it.

(Testimony of Phillip S. Kafer.)

Q. How did you know what to do about the headlights?

A. The engineer called that there was a "man in the hole" or a train on the siding.

Q. "Man in the hole?"

A. That is our railroad expression.

Q. And when you said "a man in the hole," what did you do?

A. That was the indication to stop the Mars to give them a chance to identify our train.

Q. And how would the identification occur, do you know?

A. Well, by the indicators on the engine.

Q. On your engine? A. Yes.

Q. Do I understand you to mean then by stopping the Mars from oscillating that would permit the engineer freight on the siding to see those boxes up at the front of your engine? [385]

A. The indicators are back about half way on the engine.

Q. On the passenger engine?

A. On a passenger engine.

Q. On the freight engines they are up by the funnel, is that right?

A. On the passenger—on the freight engines they are up in front of the cab.

Q. Your indicators are even forward of that position?

A. They are between the cab and the front of the engine.

Q. Yes, all right. So to permit the engineer of

(Testimony of Phillip S. Kafer.)

the—yes, he would be—the engineer on the right side, to see your train and identify it, you stopped the Mars from oscillating?

A. Well, the engineer of that train would not necessarily there are other members of the crew that could identify it.

Q. I appreciate that, by anyone in a position, a member of the train crew, to see your oncoming train, you stopped the oscillation of the Mars to permit the identification? A. Yes.

Q. Now with the Mars oscillating would that have blotted out the identification?

A. Yes, it would, momentarily.

Q. Yes, you call that dimming the lights?

A. No, that is not dimming it.

Q. Well, the purpose is to reduce the light area so that the engineer of the freight can see your identification, isn't [386] that correct?

A. Would be for any member to identify our train.

Q. Do you have an expression in the railroad parlance as to what you call that when you stop the Mars from oscillating? A. No.

Q. You don't have any "man in the hole" expression for that? A. No, we have not.

Q. Now, you knew, did you not, that you were approaching Anderson when you got that "man in the hole" call from Mr. Stainbrook, didn't you?

A. Yes, I did.

Q. And had you any time how far you were away from Anderson, that is, from the North Street

(Testimony of Phillip S. Kafer.)

crossing? A. No, not at that time I couldn't.

Q. Have you any way of approximating it as to whether it was a half mile, quarter mile or—was it south of that Signal station that you told us about?

A. I really don't know.

Q. Let me ask you this question: Was it after you started the bell ringing or before that you stopped the Mars from oscillating?

A. It would be after.

Q. After. So it was within that area you started your whistle and bell on the approach to Anderson, is that correct?

A. I started the bell, but not the whistle. [387]

Q. Limit it to the bell within the area where you started normally there, start the bell as you approach Anderson. A. Yes.

Q. Now, did you see the freight on the siding as you came into Anderson? A. I did not.

Q. From your position on the left side of that cab, how far would you say you could see in front of the engine to see the right of way?

A. I don't know how far you could.

Q. You have been a fireman now on this run for a couple of months and you have been a fireman since 1941; can't you tell us, seated on the left side of the cab, at what point you can see in front of the engine on the right of way right directly in front of the engine?

A. Oh, I guess approximately 750 feet.

Q. In other words, the obstruction of that boiler is such that you can't see the right of way ahead

(Testimony of Phillip S. Kafer.)

of you shorter than a distance of 750 feet in front of the engine, is that right?

A. Well, I don't know.

Q. Well, is that approximately right?

A. Approximately.

Q. And when you did look at the right of way from that position, you were looking at any angle to your own right, weren't you, seated on the left side of the cab? [388]

A. Yes.

Q. Now, you could see past that point on further to the right, couldn't you?

A. Oh, yes.

Q. And about what distance would the headlight beam light up the front of the engine normally?

A. I would say approximately between 800 and 1000 feet.

Q. Now, when the engineer called out "Man in the hole" to you and you stopped the Mars from oscillating, didn't you look down the track at that point—it was straight track, wasn't it?

A. Yes.

Q. And see the freight on the west side?

A. Probably seen part of it, yes.

Q. You saw part of it?

A. Saw part of it.

Q. Beyond the 750 foot point you mentioned?

A. Yes.

Q. And couldn't you see with the illumination that the headlight provided that it was blocking the North Street and Ferry crossings as you came into Anderson?

A. No, I could not. I was watching the crossings on my side approaching Anderson.

(Testimony of Phillip S. Kafer.)

Q. You were watching the crossings; didn't you also watch the full portion of the crossing that you could see? [389]

A. Yes, I watched that, but I couldn't see the train blocking the crossings, or tell which one it blocked.

Q. You couldn't see that. Was that due to the stopping of the oscillation of the Mars?

A. Speed you're moving.

Q. Due to the speed you are moving?

A. You couldn't—from my side, you couldn't tell which one of the crossing they were blocking.

Q. You say that was due to the speed at which you were moving? A. Could be.

Q. Wasn't it also due to the fact that you stopped the oscillation of the Mars?

A. I really don't know.

Q. Isn't it the purpose of the oscillating Mars to throw light on either side alternately from side to side instead of a single narrow headlight beam; isn't that the purpose of the oscillation?

A. Well, could be; yes.

Q. Well, when you are out in the open country and having oscillation, you can see a much further distance on either side than when you don't have it oscillating? A. Oh, yes.

Q. Of course you do. Therefore, by stopping its oscillation, the width of your illumination forward of the train down the track was narrowed to the single beam, wasn't it? [390] A. Yes.

Q. Now, you have said that you saw a car drive

(Testimony of Phillip S. Kafer.)

up in front of the train at the Howard Street crossing? A. Yes.

Q. Can you tell us what kind of a car you saw?

A. I cannot.

Q. How do you know it was an automobile?

A. Well, you just saw it for a flash drive up in front of you.

Q. You saw enough of it to see it was an automobile? A. Yes, I knew that.

Q. But you couldn't tell us whether you saw a sedan or convertible or what it was, is that right?

A. I could not.

Q. Can't tell us anything about whether it was—had headlights on or taillights, or any detail about it at all? A. No, I could not.

Q. Will you come down here and mark on this map where you were when you saw that automobile. You said you were south of the station at the train order post?

A. I'd better change that and say the south end of the station and train order board.

Q. Train order board? A. Yes.

Q. Well now, tell me again, you mean you were at the south end of the station? [391]

A. This train order board here (indicating) and the south end of the station.

Q. You understand the map; I think Mr. Phelps—— A. I understand it.

Q. This is the main line, this center track? (Indicating.) A. That is the center track.

Q. Will you mark on the main line as best you

(Testimony of Phillip S. Kafer.)

can you recall about where you were when you first saw the automobile?

A. See it approximately from in here in this area.

Q. Will you put a mark on there, put a little cross.

(Witness marks on map.)

Q. Between these two (indicating)?

A. I couldn't give you any exact distance.

Q. Well, the best of your recollection. You said now it was, as I understood it, south of the station at the train order post, you say now between the train order board and the south of the station?

A. Not south of the station; at the south end of the station.

Q. All right, you mark there.

A. Approximately be in here (indicating).

Q. All right. We will call that K-1; K is for Kafer. If you have been-in the service, we don't want you to be mixed up with K rations. Where was the automobile on the crossing when you saw it first?

A. I couldn't tell you. You are moving by the station, the [392] car drove out right over the crossing.

Q. You have told us it disappeared at the intersection. A. Yes, it did.

Q. That was before the collision?

A. That was before the collision.

(Testimony of Phillip S. Kafer.)

Q. After it disappeared in front of the engine before the collision, where did you see it before it disappeared?

A. Approximately in here, I would say (indicating).

Q. Will you mark where you saw it?

A. Right there (indicating).

Q. Darken that and we will call that K-2.

A. All right.

Q. As I understand, when you first saw the automobile it was at K-2 and you were at K-1?

A. Yes.

Q. According to your best recollection?

A. Best recollection.

Q. You can't tell us the speed of the automobile?

A. I could not tell you the speed of the automobile, no.

Q. Can you give us any idea how much time elapsed from the time you first saw the automobile when you were at K-1 and it was at K-2?

A. Approximately two or three seconds.

Q. Two or three seconds? A. Right. [393]

Q. Do you know how fast a train is traveling at 70 miles an hour? A. I have been told.

Q. Of course none of us know except what we have been told.

A. 105 feet a second, I have been told.

Q. 105 feet a second? A. Yes.

Q. You can't give us any estimate of the speed of the automobile at the time you saw it, but you

(Testimony of Phillip S. Kafer.)

saw it moving at K-2 and it disappeared in front of the engine on the crossing?

A. That is right. I wouldn't know anything about that.

Q. You say an interval of two or three seconds here elapsed? A. I would say so.

Q. Did you ever see the automobile again?

A. No, sir, I did not.

Q. When you got out of the engine and went around and looked at the pilot, you didn't go back and look at the automobile?

A. We are not able to go back. We stayed with our engine after the accident.

Q. That is part of your instructions, is that right?

A. That is part of our instructions, yes.

Q. I understand. As you were coming down and saw the automobile some 750 feet in front of the engine, according to your best estimate, the light from the first point, you didn't see any crossing signal at all? [394] A. I did not.

Q. Never saw it at all?

A. No, sir. I was looking for the crossing there.

Q. Did the station here get in the way of your vision as you were looking up the crossing tracks?

A. I did not see it until I was right approximately here.

Q. Directing the light from K-1 to K-2, that clears the station by considerable, doesn't it?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Cleared this portion? A. Yes.

Q. If the car had been stopped in this area where you have marked K-2 and you had been further over, the station would prevent you from——

Mr. Phelps: I object to that as hypothetical.

Mr. Murman: It may be. It may be argumentative. I won't press it.

Q. (By Mr. Murman): Tell me, Mr. Kafer, where you were when you put the Mars light on for oscillation?

A. The oscillator light was near the caboose.

Q. You mean you could see on the west side where the caboose was? A. I didn't.

Q. How did you know you put the light on as you went by the caboose? [395]

A. Well, you could tell by the sound.

Q. By sound? A. By sound.

Q. You mean the noise——

A. As your train passes along these boxcars you get a sound and as you get by the sound is a little different.

Q. As the sound of your moving train changed you concluded you went by the caboose?

A. Yes.

Q. Did you put on the Mars light for oscillation?

A. I did.

Q. That would be before you saw the car, wouldn't it? A. Yes, it was.

Q. Can you tell us here about where you started

(Testimony of Phillip S. Kafer.)

the Mars light oscillating again, having in mind that this is Ferry Street, the Ferry Street crossing to the north and here is the station to the south?

A. Well, I have a recollection of the Mars headlight flashing on the edge of the station.

Q. Which edge?

A. This edge (indicating).

Q. The west edge?

A. Well, you could call it the west edge, yes.

Q. About where the order board was?

A. Well, I don't know the exact spot. [396]

Q. I know, I don't want it with exactness. After all, this was a year ago, was it not?

A. That is right. The exact spot I couldn't say, but you could see it flashing on back and forth on this station.

Q. Was it north of the station?

A. It would be to the north of the station, yes.

Q. It was somewhere after you passed the end of the caboose and before you got to the north end of the station?

A. It could be.

Q. You said you didn't turn it on until you passed the caboose?

A. Yes.

Q. You believe the first thing you saw in the flashing was this northwest side of the station, is that right?

A. Along there.

Q. Or would it be somewhere between?

A. Between that and the crossing.

Q. And you can't tell us about where?

A. No, sir, I cannot.

(Testimony of Phillip S. Kafer.)

Q. You didn't have anything to do with the whistle operation, did you? A. No, I did not.

Q. You may take the stand again.

When you took that door off the pilot of the engine, did you look at it at all?

A. We saw it was bent around what they call the cutting level, and took it off. [397]

Q. The cutting level is on the pilot, is it?

A. It is on the pilot, yes.

Q. The door was bent around it?

A. It was bent around it, yes.

Q. The glass, I suppose, was shattered?

A. There was no glass, just the shell of the door.

Q. Just a shell of a door? A. Just a shell.

Q. You can't tell us anything about the window in the door at all? A. No, I couldn't.

Q. Do you have any recollection as to whether the speed of the train slackened at all as you came into Anderson? A. No, I have not.

Q. Are you familiar with the rule that you people have about showing the headlights as you pass the head end of a train that is on the siding?

A. We have a rule.

Mr. Phelps: If Your Honor please, that rule would be the best evidence.

Mr. Murman: All right.

Mr. Phelps: And I should like to see whatever it is.

Mr. Murman: That is the Southern Pacific rules, Mr. Phelps.

(Testimony of Phillip S. Kafer.)

Mr. Phelps: I don't know them. I didn't write them. [398] Which one is it, Mr. Murman:

Mr. Murman: 17-C.

Q. Mr. Kafer, I show you Rule 17-C of the Southern Pacific Rules and Regulations, Transportation Department, dated February 15, 1943, which is Plaintiff's Exhibit 1 for identification, and ask you if you are familiar with Rule 17-C.

A. Yes.

Q. That had to do with changing the headlight beams, doesn't it? A. Yes, it does.

Q. Now,—

Mr. Phelps: Before you go further with that, I should like to interpose an objection as to the rule on the ground that it is incompetent, irrelevant and immaterial, wouldn't establish any issue of this case, remote, and having nothing to do with this case.

Mr. Murman: I have no objection to Your Honor's looking at it. It is Rule 17-C (handing to Court). It takes in subsections C and E.

Mr. Phelps: My point is that the rule has no bearing on any issues, wouldn't tend to establish any negligence on the part of the defendant Southern Pacific Company in respect to this accident down here on Howard Street. It only applies to something, if it applies at all, and I don't think it has anything to do, but if it did, it would apply to something too [399] remote. Nothing to do with this accident, couldn't possibly establish any negligence.

Mr. Murman: Of course, you are familiar with

(Testimony of Phillip S. Kafer.)

the rule, Mr. Phelps, that they are admissible where the facts show that there has been an infraction.

Mr. Phelps: If the evidence is material to some issue.

The Court: Yes.

Mr. Phelps: It wouldn't establish any issue as between the parties.

The Court: It would have to be, it seems to me, an infraction bearing on this case. However, it seems immaterial to me, but I will allow it.

Mr. Phelps: That was my point, Your Honor.

Q. (By Mr. Murman): You are familiar with this rule that requires that:

"When the rules require headlights to be displayed, electric headlights on road engines will be dimmed to the front, except when nearing street or highway crossings—except when nearing street or highway crossings, as follows: when approaching stations where other trains are standing; when passing head end and ear end of trains on adjoining tracks." A. That could be, yes.

Q. You were on this side approaching the station and were passing the head end of the freight, but you were also nearing [400] the street or highway crossing, were you not? A. That is right.

Q. It was after you changed that Mars light back to oscillation that you first saw the car at K-2, isn't that right? A. Yes.

Q. Your best estimate. A matter of two or three seconds elapsed between the time you saw the car at

(Testimony of Phillip S. Kafer.)

K-2 and the car disappeared in front of the engine?

A. Yes.

Q. When you say it disappeared in front of the engine, do you mean the entire vehicle disappeared?

A. Drove across from out of my vision.

Q. You didn't see it at the time of the collision, then?

A. I did not, no.

Q. By the way, what kind of day was it on this particular day, a year ago yesterday?

A. Sort of misty.

Q. Could you see the mist?

A. Well, no, you couldn't.

Q. How did you know it was misty?

A. Different places coming out of Redding along there, there had been mist.

Q. Wasn't there an accumulation of dampness on your storm window?

A. I don't know if there was. [401]

Q. You had a storm window on the left side just the same as the right?

A. Yes. Probably a little on there, yes.

Q. You don't have any wipers, you use a storm window?

A. Use a storm indow.

Q. Was there an accumulation of mist on the storm window?

A. I don't recall if there was or not.

Q. Well, you were looking through it, weren't you?

A. Yes.

Q. Can you tell us whether there was dampness or drops of water or some accumulation of moisture on that window?

(Testimony of Phillip S. Kafer.)

A. I had wiped the window off.

Q. Where had you done that?

A. Redding.

Q. At Redding? Did you wipe it again before the accident?

A. Oh, I imagine once or twice, yes.

Q. When you say you imagine, you mean that is your best recollection?

A. That is the best recollection I have, yes.

Q. You are not just imagining things? You are trying to tell us what you remember?

A. I am trying to tell you what I remember.

Q. You say once or twice? Can you tell us, according to your best recollection again, now, about where it was the last time, about where you were on the track the last time you [402] wiped the storm window off?

A. I couldn't tell you.

Q. But you do remember that there was sufficient moisture accumulated on that storm window to require you to wipe it off once or twice between Redding and Anderson?

A. Well, yes.

Q. And your speed all that time was about constant, was it?

A. Well, it would average according to the contours of the land.

Q. Isn't it a generally down grade from Anderson to Redding?

A. Up and down, yes.

Q. But mostly down?

A. You have a little.

Q. As you come into Anderson?

(Testimony of Phillip S. Kafer.)

A. Downgrade there, yes.

Q. How about the lighting conditions? What was the condition of the light? A. Dark.

Q. It was dark? Was it dark up to the time that the engine came to a stop a half mile beyond the crossing? A. Yes.

Q. Of course, when you got out and looked at it in the headlight, you could see it clearly in the darkness, is that right? A. Yes, we could.

Q. Did you see any flagmen in the vicinity of this crossing [403] as you approached it this morning, speaking of the Howard Street crossing now?

A. I did not.

Mr. Phelps: I make the same objection, Your Honor. I know Your Honor's ruling.

Q. (By Mr. Murman): That was a 15 car train, was it?

A. I don't remember the number of cars. I think around 15.

Q. Do you remember whether it had a name or not, or was it just train 13?

A. I believe it was called the Beaver.

Mr. Murman: I have no further questions from this witness.

Redirect Examination

By Mr. Phelps:

Q. Mr. Kafer, in addition to this switch which controls the oscillating of the Mars light, your head-

(Testimony of Phillip S. Kafer.)

lights have another switch to control the amount of the light within the headlight, is that correct?

A. Yes, it does.

Q. That is called a dimming, is that correct?

A. That is.

Q. When you dim the light, it is like on an automobile?
A. That is right.

Q. Less candlepower?
A. That is it.

Q. That is the only thing that has reference to, is that [404] correct?
A. Yes.

Q. You did not dim the light in that sense?

A. I did not dim it in that sense, no.

Q. The only thing——

The Court: As I read the regulation, it didn't require it, anyway.

Mr. Phelps: It didn't require it anyway, but I thought we better cover it 100 per cent, since Your Honor permitted it in.

Q. Now, then, Mr. Kafer, in the cab of the locomotive, and where you were seated, your seat is alongside—your seatbox has an armrest to your left, does it not?
A. Yes, it does.

Q. To your left there is an open window, is there not?
A. Yes.

Q. There is no glass in that window of any kind?

A. Not in the window itself, no.

Q. The only open window that you were looking out of and leaning out of? Is that in the operation of the locomotive, both fireman and engineer?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. That is where you look for your view?

A. Yes.

Q. The storm window has the effect of deflecting wind and mist [405] and rain around you, is that right?

A. Yes.

Q. So that in looking out you can look ahead without interference from mist and rain?

A. Yes.

Q. You find that is the effect? So that on this occasion as you were approaching Anderson you were looking out of the open window without any glass whatsoever?

A. Yes, I was.

Q. Now, then, you were asked with reference to the beam of the headlight when you directed the beam of the headlight directly down the track—that is, the Mars light—there are two, one above the other, is that correct?

A. That is right, yes.

Q. Both directed down the line. And you were asked about this narrow beam. Does it, as it goes out, spread out, does it not?

A. Yes.

Q. So that it doesn't just encompass the track itself?

A. No.

Q. In addition to what other purposes there may be as to the Mars light, one of the purposes of an oscillating light is to attract attention of people, motorists, and so forth, isn't that right?

A. Yes, it is.

Q. Other than a still light which doesn't have so much tendency [406] to attract attention?

A. Yes.

(Testimony of Phillip S. Kafer.)

Q. Now, then, Mr. Kafer, you were asked with reference to watching the righthand side of the track—it would be on the engineer's side?

A. That would be the engineer's side.

Q. In the ordinary operation of the locomotive, and was it or was it not true on this occasion, that the fireman, and you as a fireman, were charged with the duty of looking to the left at crossings to see traffic, and so forth?

A. Yes, I was.

Q. You divide the duties and responsibilities in that regard?

A. Yes.

Q. So that your attention is always directed to the left rather than to the right?

A. Yes, it is.

Q. And down the track.

A. Down the track, yes.

Q. Can you tell us whether or not in your experience as a fireman, whether or not in looking out and down the track, and ahead, for approaching vehicular traffic on crossings, whether or not you would keep your eye centered down in the watching, not only at Howard Street crossing, but also the crossing beyond?

A. Yes. [407]

Q. It is your duty to watch both crossings?

A. Be watching all crossings, yes.

Mr. Phelps: I have no other questions.

Recross-Examination

By Mr. Murman:

Q. Mr. Kafer, you say there were two switches for the headlights?

A. Yes, sir.

(Testimony of Phillip S. Kafer.)

Q. Where were they located in the cab?

A. Right over the cab, right up on my side near up above the window.

Q. Are they rocker switches or open?

A. No, it had a sort of a toggle switch and the other, the Mars light, has a sort of a quadrant.

Q. Did you look up to grasp the Mars switch when you turned the oscillator back on?

A. No, my hand was on the Mars switch.

Q. Did you have your hand on the Mars switch all the time?

A. During the time going by the train, yes, because it is much easier if you have your hand on it, on the grip, to flick it than it would be down here and look around up. That would distract your attention.

Q. You can't use your left hand as you showed us?

A. Yes.

Q. That is the side that is out toward the open window, isn't it? [408]

A. Yes.

Mr. Murman: No further questions.

Mr. Phelps: I have no further questions. May this witness be excused, Your Honor?

The Court: Yes.

Mr. Murman: I have no objection.

Mr. Phelps: You may be excused.

Call Mr. George Thomas.

GEORGE W. THOMAS

called on behalf of the defendant; sworn.

The Clerk: Q. State your full name to the Court and jury, please.

A. George W. Thomas.

Direct Examination

By Mr. Phelps:

Q. Mr. Thomas, where do you live?

A. At Dunsmuir, California.

Q. How long have you lived there?

A. Nine years.

Q. Now, by whom are you employed?

A. Southern Pacific.

Q. How long have you been employed by the Southern Pacific Company?

A. Nine years altogether.

Q. In what capacity? [409] A. Brakeman.

Q. Other than working for the Southern Pacific Company, have you had any experience with any other railroads? A. Yes, I have.

Q. Now, then, in December—December 27, 1948—were you then engaged in your occupation as a brakeman for the Southern Pacific Company?

A. Yes, sir.

Q. And at that time do you remember what division you were working on?

A. Shasta Division.

Q. Do you still work on the Shasta Division?

A. I do.

Q. Had you worked on the Shasta Division the

(Testimony of George W. Thomas.)

entire nine years you worked for the Southern Pacific Company? A. Yes, sir.

Q. Now, then, Mr. Thomas, I direct your attention to December 27, 1948, and ask you if you recall an incident in which there was an accident in which a Mr. Shanahan was killed at the Howard Street crossing. A. I do.

Q. First, will you tell us whether or not you saw that accident? A. I did not.

Q. Now, then, Mr. Thomas, on that morning a member of what [410] crew were you?

A. I was swing brakeman with conductor Griffith.

Q. Conductor Griffith had what train?

A. Second-618.

Q. Is that a passenger train or freight train?

A. Freight train.

Q. Will you tell us where that train was when it came into Anderson?

A. It was at the siding.

Q. Will you step down to the map, please.

(The witness left the witness stand.)

Q. This is the station. This is in the direction of Redding, and I am pointing to the right. It is left on the map, toward Red Bluff. A. Yes.

Q. The main line track has been identified the east main line here. To the west of that is what appears to be a passing track, then there is a track adjacent to the station and east of the main line.

A. Yes.

(Testimony of George W. Thomas.)

Q. Will you indicate which track your train was on? A. We were on this one here.

Mr. Phelps: Indicating, may it please the Court, for the record, the passing track to the west of the main line.

Q. Now, Mr. Thomas, do you remember from which direction you [411] had come?

A. Yes, we came from the west.

Q. You are using railroad directions again. Railroad west to you means——

A. Northwest.

Q. Toward San Francisco, is that right?

A. That is right.

Q. Will you try to use geographical directions?

A. All right, sir. We had came from the west.

Q. From the west and proceeding north?

A. Yes.

Q. In the direction of Redding?

A. That is right.

Q. Now, as you came in, then, your train came in on the main line I am now indicating on the map.

A. Yes, sir.

Q. Then to that siding on the switch on the map?

A. Yes, sir.

Q. And went on it? Will you resume the stand?

(The witness resumed the witness stand.)

Q. Do you remember approximately how many cars you had that day?

A. I believe it was 99, if I remember correctly.

Q. Now, your job, you said, was swing brakeman. Will you tell us what a swing brakeman does? [412]

(Testimony of George W. Thomas.)

A. That is the man that takes charge and supervision of movement of the train, inspection, and so forth, does switching.

Q. So that there is a head man, rear man and swing man? A. And the swing man.

Q. And the swing man goes between——

A. The whole entire train.

Q. Now, as best you can, as you came into the siding, will you tell us—can you fix, first, if you can, the location of the caboose after you came to a stop? First, I am assuming you did. I am getting ahead of myself. When you came to the siding, what did you do?

A. As soon as the train came to a full stop, I got off the caboose.

Q. I mean, what did the train do? What did you do? A. Stopped at the siding.

Q. Do you know what the purpose of that stop there was?

A. For the meeting of three trains.

Q. About how long did your train remain at the siding there at Anderson? A. About an hour.

Q. During that time how many trains came by from a northerly direction? A. Three.

Q. Now, then, as you took the siding, can you tell us approximately where, if you can, your caboose came to a stop. About [413] where was it with reference to the Ferry Street crossing or the station? A. About the station.

Q. I beg your pardon?

(Testimony of George W. Thomas.)

A. It was about the station, where the caboose stopped.

Q. And to your recollection, can you tell us, then, after it came to a stop what did you do? In the first place, where were you? Where were you riding when you came in?

A. Riding in the caboose.

Q. Riding in the caboose? After it came to a stop, what did you do?

A. Got off the caboose, went down to the crossing below, and I waited around there at the cars to see if I was going to have to cut that crossing or not till the train went by.

Q. When that first train went by, was that a passenger train, freight train, or what was it?

A. It was a passenger.

Q. Do you remember what the number of the train was? A. No. 11.

Q. Now, what were your duties with respect to a train coming in, coming south, meeting yours? What were your duties in respect to that train?

A. We always check, check the indicators to see if it was the train we were meeting.

Q. You did that on this occasion? [414]

A. I did, sir.

Mr. Phelps: I see. It is 11:00 o'clock, Your Honor. This is as convenient a place as any to stop.

The Court: Recess for ten minutes, and during the recess bear in mind the admonition heretofore given you.

(Recess.)

(Testimony of George W. Thomas.)

Q. At the recess, Mr. Thomas, we had talked about 11 coming through. Now, as the train, No. 11, went by, was there another train before the No. 13? A. Yes.

Q. What kind of a train was that?

A. Two light engines and the caboose.

Q. And did you observe that train?

A. I did.

Q. And when you saw that approaching what did you do?

A. Started over to the train to inspect my train.

Q. On the—to inspect the running and so forth of your train? A. Yes, sir.

Q. After that train went by, what was the next train that came through? A. No. 13.

Q. All right now, as 13 came into view, where did you first see—what was the first thing that attracted your attention that 13 was coming into Anderson?

A. I saw headlights coming around a curve out of Garvain.

Q. What kind of a headlight was it that you saw?

A. Well, he had two headlights, the regular headlight and the Mars lights.

Q. And at that time was either or both lights stationary, or one moving?

A. One was moving. [415]

Q. Now, how far away is the point Garvain, or a curve where you first saw the locomotive headlight from where you were? A. Four miles.

(Testimony of George W. Thomas.)

Q. I beg your pardon? A. Four miles.

Q. And where were you at that time?

A. I was up about 35 cars when I first saw the headlights from the caboose.

Q. Now, we have been using car lengths. You had a freight train? A. Yes, sir.

Q. What do you normally, you railroad men, mean by a car length with reference to a freight train car length?

A. Well, it is the only way we have to tell our location, if we are asked.

Q. Well, how long is a car length?

A. It varies from—different length, some 40 feet, some are 50 feet.

Q. All right. And what is about the average?

A. Average about 45.

Q. That differs from the length of passenger cars? A. It does, sir.

Q. Now, as you saw the train approaching, as you described it, at any time while it was in your view, did you see any change in the—anything on the engine? [416] A. Not until he got close.

Q. And what happened?

A. The Mars light went stationary for the main line about a half a mile beyond our engine.

Q. Now then, it is part of your duties—did you have any duties with respect to checking that train?

A. Yes, it is our duty to check all trains.

Q. And can you tell us whether or not the train
13 as it came into Anderson and after it passed you

(Testimony of George W. Thomas.)

going through Anderson, were any crossing whistles sounded? A. Yes, they were sounded.

Q. Approximately where, as you now remember, were the whistles sounded?

A. Just as he passed on through, he started sounding for the North Street crossing.

Q. For the North Street crossing?

A. Yes.

Q. And thereafter did he continue to sound whistles? A. Yes.

Q. And were any whistles sounded for any crossing north of the North Street crossing?

A. Yes.

Q. Now, so far as you are concerned, you have already told us you didn't see this accident?

A. I did not. [417]

Q. Now, when was it that you first learned that there was an accident?

A. As I got on the caboose, pulled out of the siding, the conductor told me.

Q. How long was that after 13 passed?

A. Approximately three or four minutes.

Q. You learned about the accident from whom?

A. From the conductor.

Q. By that time will you tell us whether or not your train was pulling out of the siding and on your way?

A. We were out on our way, we had cleared the main line.

Q. The front end of the train——

(Testimony of George W. Thomas.)

A. The whole train.

Q. You got on——

A. I got on at the switch.

Q. What was the state of the weather as you recall it?

A. It was cloudy and misting rain.

Q. Had been raining that night?

A. It had.

Q. Was it raining at that time?

A. Just misting.

Q. Just misting. And so far as darkness or light, how was that?

A. Well, it was still dark.

Q. Had dawn broken? [418]

A. Just starting to break.

Mr. Phelps: I have no other questions.

Cross-Examination

By Mr. Murman:

Q. Mr. Thomas, No. 11 was the Cascade, wasn't it? A. Yes.

Q. You said the caboose stopped at about the station. Could you come down here to this map and mark the rear of the caboose as you recall it? You understand the map? Mr. Phelps explained it to you, I believe.

A. I do. Somewhere in here (indicating).

Q. Will you mark a cross according to your best recollection as to the rear of the caboose?

(Witness marks on map.)

(Testimony of George W. Thomas.)

Q. I will darken that. I will call that T-1.

A. Yes.

Q. Thank you.

Mr. Murman: I have no further questions.

Mr. Phelps: I have no further questions.

The Court: That is all for you.

Mr. Phelps: May this witness be excused?

The Witness: Thank you.

Mr. Phelps: Call Mr. Griffith. [419]

LUTHER L. GRIFFITH

called as a witness on behalf of the defendant,
sworn.

The Clerk: Will you state your full name to the
court and jury, please?

A. Luther L. Griffith.

Direct Examination

By Mr. Phelps:

Q. Will you state your full name, please?

A. Luther L. Griffith.

Q. And where do you live, Mr. Griffith?

A. Dunsmuir, California.

Q. And how long have you lived there?

A. I have lived there 30 years.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. And in what capacity?

A. As a conductor.

Q. Before being employed as a conductor, what

(Testimony of Luther L. Griffith.)

was your capacity with the Southern Pacific Company? A. As a brakeman.

Q. When were you first hired as a brakeman?

A. In September 9, 1919.

Q. And since that time have been continuously employed either as a brakeman and then as a conductor? A. Yes, sir.

Q. When were you promoted to conductor? [420]

A. 1926.

Q. And on what division are you employed?

A. Shasta Division.

Q. The entire time? A. Yes, sir.

Q. Now, then, Mr. Griffith—in December, 1948, December 27, 1948—do you remember an accident in which an automobile was struck at the Howard Street crossing in Anderson in the morning?

A. Yes, sir.

Q. Now, on that morning, you were a member of what crew? A. Train second, 618.

Q. How many cars did you have?

A. As near as I recall, 99 cars.

Q. Freight train or passenger?

A. Freight train.

Q. And in which direction had you come from?

A. We had come from Gerber going east on the railroad——

Q. Geographically which direction?

Mr. Murman: Any time the witnesses say east, I will stipulate it is north.

Mr. Phelps: I know——

A. It would be north.

(Testimony of Luther L. Griffith.)

Mr. Murman: That is as to operation of trains only.

Mr. Phelps: That's right. [421]

Don't have any difficulties, your Honor, only two direction, and a train can come from only one direction, and you can't get mixed up that way.

Q. All right, now, as you came in to the—into Anderson, will you tell us whether or not your train was required to stop?

A. Yes, sir, it was required to take siding.

Q. Take siding, what do you mean by that?

A. To clear the main track to let trains by, or to meet trains.

Q. And do you remember how many trains you had to meet?

A. We had three trains to meet there.

Q. From which direction were they coming?

A. They were coming from the north.

Q. From the north. And you were also, I take it, familiar with this map. I would like to have you come down and look at it—you are familiar with the area—and look at the map. I want to point out to you—this is, it is not marked as such—this is the Howard Street crossing, this is the station, to the right of the map is in the direction of Redding, left of the map is in the direction of Gerber, and three tracks shown on here, the center track is what track? A. Main track.

Q. Now the track which is on the highway side, the side away from the station, is what track? [422]

A. Is the siding.

(Testimony of Luther L. Griffith.)

Q. The other tracks shown here on the station side, what is that?

A. That is known as the house track.

Q. All right. When you took the siding, you took then which track?

A. I took this track (indicating).

Q. Indicating the west track? A. Yes.

Q. And the other house track, is that long enough to hold 99 car freight train? A. No, sir.

Q. Will you resume the stand, please?

Now, Mr. Griffith, after your train came in the siding and it came to a stop to wait for the trains—— A. Yes.

Q. Now, will you tell us approximately, to the best of your recollection, where your caboose stopped?

A. Well, the best of my recollection, the caboose had stopped just north of the last mark you have on that map.

Q. Well, come down and mark it for us, will you, where you think the caboose stopped?

A. To the best of my recollection, my caboose would probably fit right in here (indicating).

Q. All right. You have marked a cross on there, we will make [423] it a little blacker and make a line and call this G-1, and that indicates the spot where you think your caboose was approximately?

A. Approximately in that locality.

Q. Now will you resume the stand?

How long did your train remain in the siding at Anderson in that position?

(Testimony of Luther L. Griffith.)

A. As near as I remember, about an hour.

Q. When the first of those trains came through of the three that you were to meet, do you remember approximately what time, or don't you know?

A. I don't know.

Q. That was after you had taken the siding a train came through; was that a passenger?

A. The first train came through was a passenger train, No. 11.

Q. No. 11. Now, when that train came through, where were you? A. I was on the ground.

Q. And whereabouts on the ground?

A. Behind the caboose.

Q. And as that train came through did you make any observation as to the operation of the wig-wag signal at the Howard Street crossing?

A. Yes, sir.

Q. And will you tell us whether or not it operated? A. It was operating. [424]

Q. Will you tell us whether or not you saw the oscillating or wig-wagging, whatever?

A. It was wig-wagging, as they call it.

Q. Was the bell ringing? A. Yes, sir.

Q. Was the light on? A. Yes, sir.

Q. All right. After that train passed, what was the next thing that happened?

A. The next train that came through was two light engines, and a caboose.

Q. Now, tell us with reference to those what, if anything, they did?

(Testimony of Luther L. Griffith.)

A. They stopped and the conductor went to the telephone.

Q. Where did they stop?

A. They stopped with the caboose at the station platform.

Q. And did you go over to the caboose or did you stay where you were?

A. I started to the caboose, but they left before I got in the caboose.

Q. All right. Now, then, and while that train was stopped, they were still on the main line?

A. It was on the main line, yes, sir.

Q. And incidentally, No. 11 came through on the main line? A. Yes, sir. [425]

Q. Now, when that train stopped and did you make any observation as to whether or not the wig-wag signal at the Howard Street crossing was operating?

A. The wig-wag signal were operating.

Q. Now, approximately to the best of your recollection, about how long was that prior to the accident?

A. To the best of my recollection, between 10 and 15 minutes.

Q. And you told us, you say that this was not a regular train, the second one?

A. No, it was an extra train.

Q. What did you use, the term "caboose hop"?

A. Caboose hop.

Q. That is an enginee and a caboose?

(Testimony of Luther L. Griffith.)

A. Or more than one engine and a caboose.

Q. This had two engines and a caboose?

A. Two engines and a caboose.

Q. Now, Mr. Griffith, directing your attention to the last train that came through, what train was that? A. That was No. 13.

Q. Now, where were you when that train came through?

A. I was behind the caboose when the train came through.

Q. Now, before that—first, where were you when you first saw that train?

A. I was on the station platform.

Q. And that would be then on the east side of the main track? [426] A. Yes, sir.

Q. And what was it that attracted your attention that the train was coming?

A. I saw the headlights coming.

Q. At the time you saw it, do you know whether or not they were stationary or oscillating?

A. It was oscillating.

Q. And at any time after you first observed it, was there any change in that condition?

A. Yes, sir, when the 13 passed the caboose, two headlights were centered for the track.

Q. Now, you were on the station platform when you first saw it; you were behind the caboose when the train went by? A. Yes, sir.

Q. Some time in there you must have changed your position. Will you tell us when and how you did it?

(Testimony of Luther L. Griffith.)

A. Well, as near as I remember the train No. 13 was probably a thousand to 1500 feet before the train reached me, I crossed over.

Q. And what was the purpose in crossing over?

A. Well, to be behind my train and to get an indication as we have to check indicators on all trains we meet on the road.

Q. Now, were you intending to stay there for any other trains? A. No, sir.

Q. So that as soon as 13 cleared, you were ready to go out of [427] town? A. Yes, sir.

Q. Then as you resumed your position, or took your position behind the caboose on the passing track, was anyone with you?

A. A rear brakeman which now is not in service, as near as I can find out.

Q. What is his name? A. Johnson.

Q. You say he is not in service?

A. Not in service.

Q. You haven't seen him, you don't know where he is? A. No, sir.

Q. Then will you tell us as best you can, as you were standing there behind the caboose, the train went by; first, can you tell us whether or not you made any observation as to whether the wig-wag was working? A. The wig-wag was working.

Q. This was as 13 was approaching the crossing?

A. No. 13.

Q. Now, then, did you see the accident?

A. Yes, sir.

Q. You did. [428]

(Testimony of Luther L. Griffith.)

Q. Will you tell us, then, what you saw first of the automobile?

A. I saw the automobile approaching the crossing.

Q. All right, and approximately how far from the main line then was it when you first saw it?

A. I would estimate between 30 and 40 feet.

Q. At that time was it moving or standing still?

A. It was moving.

Q. Did you have an opportunity to estimate its speed?

A. Well, I would estimate his speed at about 8 or 10 miles an hour.

Q. As you saw that automobile approaching, did it ever stop before the collision?

A. From my viewpoint, I don't think it did stop.

Q. Well, did you see it stop?

A. I didn't see it stop.

Q. Were you looking at the train or did you have an opportunity to determine whether or not the locomotive was, rather, where the locomotive was when you first saw the car?

A. I didn't quite understand that question.

Q. All right. You first saw the automobile, I believe, when it was between 30 and 40 feet from the mainline? A. Yes.

Q. It was moving then? A. Yes. [429]

Q. Have you any way of telling us, if you can—have you any way of telling us where the locomotive was at that time, or were you looking at it?

(Testimony of Luther L. Griffith.)

A. I was looking directly at the locomotive at that time.

Q. Prior to that time, prior to seeing the automobile, had you made any observations as to the headlights of No. 13 as it was approaching?

A. Yes, sir.

Q. You have already told us about that. All right. Now, then, prior to seeing the automobile had you made any observations as to whether or not any passing whistles were sounded by No. 13 as it was approaching Anderson?

A. The whistles were being sounded continually while coming up the main track.

Q. From how far back, continually?

A. Well, I would estimate a half a mile.

Q. And where with reference to the North Street crossing?

A. Well, the North Street crossing, I couldn't say. That was farther down in the train.

Q. Well, at least a half mile from where you were?

A. Before reaching that North Street crossing.

Q. Before reaching the North Street crossing? Now, then, do you remember whether or not there were any whistles sounded when 13 approached the head end of the train on the siding?

A. I couldn't say. [430]

Q. Now, then, after the impact what did you do?

A. After the impact?

Q. Yes.

(Testimony of Luther L. Griffith.)

A. I didn't do anything. We were leaving the siding at that time.

Q. The train was already in motion?

A. Well, just started about the time of the impact.

Q. You had to catch your train and you went on out? A. Yes.

Q. Did you have any occasion prior to the seeing of the automobile which you saw, did you observe the operation of the wig-wag at the Howard Street crossing?

A. Yes, sir, I observed the wig-wag when I was on the station platform.

Q. That was before you crossed over?

A. And before I crossed over.

Q. Did you make any observation as to whether or not the bell was ringing on the wig-wag?

A. I could hear the bell ringing.

Q. You could? A. Yes, sir.

Q. Did you make any observation as to whether or not the light was on on the wig-wag when you were on the station platform?

A. Well, I couldn't say for sure. I think they were. [431]

Q. And also as to whether or not it was oscillating back and forth? A. It was oscillating.

Q. All right, after you crossed over and were standing there behind the caboose, did Mr. Johnson also, after the accident, get aboard?

A. Yes, sir.

Q. Where did Mr. Thomas get aboard, if you

(Testimony of Luther L. Griffith.)

remember? You know Mr. Thomas, the swing brakeman?

A. I think Mr. Thomas boarded the train at the east switch on the north end of the siding.

Q. Did you tell him that there had been an accident at that crossing? A. Yes, sir.

Mr. Phelps: That is all. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Griffith, it was dark when you got to the siding, was it not?

A. Yes, just breaking day.

Q. It was just breaking day when you got to the siding or when you left it?

A. It was dark when we got to the siding and when we left the siding it was just breaking day.

Q. You were there about an hour, you estimate?

A. About an hour. [432]

Q. You can't tell us now about what time it was when you got on the siding, as I understand it?

A. No, sir, I can't tell you just what time it was.

Q. It was dark? Was the weather misty that morning?

A. The weather was misty and it had been raining.

Q. Had been raining? And how was the temperature?

A. I didn't look at the temperature.

Q. Well, were you dressed in warm clothes?

(Testimony of Luther L. Griffith.)

A. Well, I couldn't answer that question.

Q. This was a year ago December, this December. You have been a conductor, brakeman, and so forth on that Shasta Division for a long time. What do you know about the temperature there at 6:00 o'clock in the morning up in that area?

A. Well, may I explain that question, your Honor?

The Court: Yes.

A. It all depends about this warm clothes what we would—what you would call warm clothes. We wouldn't and what you don't call warm clothes we do, because we wear a lot of wool.

Q. Were you wearing a lot of wool that day?

A. Evidently.

Q. You had on your long ones, eh?

A. No, never wear them.

Q. When the train stopped on the west siding, your freight train, you got out of the caboose, is that right?

A. Yes, sir. [433]

Q. And you put a mark here, they call that "G-1," about the rear of the caboose.

A. Just about the rear of the caboose, yes, sir.

Q. You stood there, did you, or what did you do?

A. Oh, I moved around different locations.

Q. That was before No. 11 showed up?

A. Yes, sir.

Q. And when did you first notice No. 11 coming into view?

A. Right after we got there on the siding, or in the clear of the main track.

(Testimony of Luther L. Griffith.)

Q. Right after you got on the siding you noticed No. 11 coming into view? A. Yes, sir.

Mr. Murman: By the way, I have a train dispatcher's sheets here, Mr. Phelps, that shows No. 11 went through Redding at 7:03 that morning, or 7:02, and left at 7:03, is that it?

Mr. Phelps: I think that is undoubtedly correct. That is Anderson?

Mr. Murman: No, this is Redding. That would be north of Anderson. In other words, it would be even later at Anderson. Around 7:00 o'clock.

Mr. Phelps: Yes.

Q. (By Mr. Murman): Does that refresh your memory, Mr. Griffith, it was a little after 7:00 when No. 11 came into view? It was right after you got out of the caboose that you [434] saw No. 11?

A. Yes.

Q. That is the Cascade, by the way, isn't it?

A. We just call it by No. 11.

Q. You don't give them any fancy names?

A. No fancy names.

Q. You were coming around in the vicinity of the rear of the caboose, is that right?

A. That is right.

Q. When did you first look toward the Howard Street crossing?

A. Oh, a number of times, just walking around.

Q. I mean in relation to No. 11, now. We are talking about No. 11. When did you first look toward the Howard Street crossing?

(Testimony of Luther L. Griffith.)

A. I couldn't just tell you when I first looked, but I remember looking a number of times.

Q. Was there anything down that way particularly attracted your attention? A. No, sir.

Q. So when you looked that way it was just in the normal course of looking about, is that correct?

A. That is right.

Q. Now, you have told us that as you were at the rear of this caboose where you have marked G-1, you saw the wig-wag at Howard Street crossing operate as No. 11 came into Anderson, [435] is that correct? A. Yes, sir.

Q. When did you first notice it was operating?

A. When we were heading in the siding and before we cleared the main track.

Q. That is your train, now? A. Yes.

Q. We will go past that now. When did you first notice it was operating as No. 11 came into Anderson?

A. Well, apparently when the headlight looked between the switches, that is, between the siding switches at Anderson.

Q. Are you talking about the so-called house track? A. The siding.

Q. The siding? That is the west siding?

A. That is the west track, sir.

Q. You said the headlights looked like it was between the switches? A. Yes.

Q. Was your train occupying the entire siding with the exception of the distance between the caboose and the south switch? A. Yes, sir.

(Testimony of Luther L. Griffith.)

Q. You had 99 cars, I believe? A. Yes.

Q. The engine and tender, of course, would be an additional unit? [436] A. Yes, sir.

Q. 100 units in all?

A. Well, they aren't known by units in steam engines.

Q. Pardon me if I call it that way, but you had 99 cars plus the engine and tender?

A. And caboose.

Q. Oh, the caboose is extra, too? A. Yes.

Q. I see. The average length, I think you said, of all cars is around 45 feet. Of course, the engine was longer and the caboose would be about the same length, wouldn't it, the caboose about 35 to 40 feet, and the engine is a longer unit—pardon me if I use that expression. A. Yes.

Q. The first time you saw the signal was when No. 11 was halfway between the switches, according to your best estimate? A. Yes.

Q. What attracted your attention to the wig-wag? A. What?

Q. What attracted your attention to the wig-wag?

A. Well, it is customary that on the cars I have, we kind of protect crossings when we are there around where we kind of block them or anything, and we notice all that stuff for our own benefit and for the benefit of the public.

Q. Then you were paying particular attention to the wig-wag, [437] is that correct? A. Yes.

(Testimony of Luther L. Griffith.)

Q. I see. Then it was dark, was it not?

A. Yes.

Q. And misty, isn't that right? A. Yes.

Q. And contrary to the way this wig-wag is drawn here—you have seen it, haven't you?

A. Yes.

Q. It is actually upright and wig-wagging this way (indicating), not up and down this way (indicating), isn't that correct?

A. That is correct.

Q. You were here looking at the profile of it, weren't you?

A. No, I was looking at the wig-wag.

Q. Well, you were looking at the standard that the wig-wag was on? I show you Defendant's Exhibit A which is a picture of the wig-wag looking north. Isn't that about the profile you saw from where you were up here back of the caboose?

A. Well, a number of times, if I may——

Q. Just answer the question. Then you can explain it. Isn't that about the profile you looked at, only you looked from the other direction?

A. Well, I wouldn't say because a number of times I was on the station platform.

Q. I know, but we are talking now about the time you were back [438] of the caboose here and No. 11 coming down there. I guess it was coming—have you any idea of the speed of it?

A. No, I haven't.

Q. Well, was it 60 miles an hour or less or more?

A. Well, I couldn't say.

(Testimony of Luther L. Griffith.)

Q. No, but you have been a railroad man for many, many years, since 1919, I think. That is right, isn't it? 30 years. Can't you tell us your estimate of the speed No. 11 was coming as she came through there?

A. I would estimate the speed of No. 11 between 65 and 70 miles an hour.

Q. No. 11 come down there between 65 and 70 miles an hour, and you were here back of G-1 and you were looking generally toward the south. Isn't that about what you saw, the profile of that wig-wag, just reversing the picture?

A. From where I was standing you could see the wig-wag and see that the wig-wag was working.

Q. All right. All right, I am not saying you aren't testifying to seeing the wig-wag working at Anderson. When you were looking at it, didn't you look at the profile of it as shown in that picture, only on the other side, on the reverse side of it? I just want to know if you weren't looking at the profile.

Mr. Phelps: I think he doesn't understand what profile is. I don't know.

Q. (By Mr. Murman): Do you know what a profile is? [439] A. No.

Q. I am sorry. Look at me. This is my profile.

A. Yes.

Q. Now, you are looking full at me.

A. Yes, sir.

Q. Here is a full view of the wig-wag?

A. Yes, sir.

(Testimony of Luther L. Griffith.)

Q. There is a profile view of it, looking at it from the south? A. Yes, sir.

Q. Is that what you saw when you looked at it from the north? A. Yes, sir.

Q. All right. I am sorry, I didn't understand that you didn't understand me. If you don't understand me at any time, say so, because, after all, we want to understand each other.

You were in this same general position back of the caboose, as I understand it, when No. 13 cleared at the time that you stated that you saw the wig-wag working as No. 13 came through?

A. That is right.

Q. Is that right?

A. No, I was on the station platform when No. 13 was approaching the Anderson station.

Q. That is correct. I understand.

A. At that time I had almost a clear view of the wig-wag. [440]

Q. Oh.

A. As 13 approached the caboose, I crossed the main track over behind the caboose.

Q. In front of 13? A. Yes, sir.

Q. I see. Where was No. 13 about the time you crossed from the station platform over to the caboose?

A. Well, as you have marked it, store crossing, 13 was north of that crossing yet.

Q. North of the store crossing, which on here is called North Street crossing?

(Testimony of Luther L. Griffith.)

A. North Street crossing.

Q. You have seen the North Street crossing, have you?

A. Have I seen the North Street crossing?

Q. Yes. A. Yes.

Q. You say it was north of the North Street crossing? A. Yes.

Q. How far north, approximately? Approximately how far?

A. Well, I would estimate it about 500 feet.

Q. 500 feet. So that when you crossed from the station platform over to the caboose, No. 13 was about 500 feet north of the North Street crossing?

A. Yes, sir.

Q. And when you got over to the caboose, where was No. 13? [441]

A. No. 13 was between the North Street crossing and the caboose.

Q. And the caboose? That would be between North Street and G-1? A. Yes, sir.

Q. Was it coming at about the same speed as you estimated the Cascade coming?

A. Yes, sir.

Q. As you were back of the caboose here about, here, I believe you said, you looked at the Howard Street crossing and saw the wigwag, is that right?

A. Yes.

Q. And both as to No. 11 and No. 13, were bells ringing those two locomotives as they came down to the crossing? A. Yes.

(Testimony of Luther L. Griffith.)

Q. Was it one of those dang-dang-dang-dang-dang-dang-dang bells, like that?

A. I don't remember that.

Q. It isn't a swing bell, is it? It is a clapper bell?

A. I don't remember. Different engines have different types bells.

Q. Didn't you hear it?

A. You could hear it.

Q. Was it a dong-dong-dong-dong-dong-dong-dong bell? A. I don't remember. [442]

Q. Do you remember the old type bell that had a piston that swung back and forth and went dong-dong-dong? A. Yes.

Q. This was a newer type?

A. The old type, if it gets spinning, will dang-dang-dang, too.

Q. You mean when it does a loop?

A. Yes.

Q. That is when the fireman gives it too much steam and it gets going 'round and 'round. This was a modern engine on the Cascade and the Beaver, was it not, new engines with Mars lights on? A. Yes.

Q. So that it didn't have an old piston bell, did it? A. I couldn't say.

Q. But you did hear a bell ringing.

A. I did hear a bell ringing.

Q. And when you remember hearing the bell ringing on the engines as they entered—let's take the Cascade, first. About the Cascade engine, when

(Testimony of Luther L. Griffith.)

you heard the bell ring, about where was it at the time?

A. It was in the vicinity of the caboose.

Q. You didn't hear it before it got to the vicinity of the caboose? A. I don't think so. [443]

Q. That is your best recollection?

A. That is my best recollection.

Q. How about the Beaver? How about No. 13? Where did you pick up the bell on that?

A. I think past the caboose.

Q. Past the caboose? You didn't hear the bell before that? A. The whistle was blowing.

Q. No, I am asking you about the bell, now.

A. No, sir.

Q. You never heard the bell until it got past the caboose? A. I think it was past the caboose.

Q. When it was past the caboose you heard the bell? A. Yes.

Q. It was just before that you had gone over behind the caboose? As I remember it, you said the engine was halfway between the caboose and the North Street when you got behind the caboose, is that it? A. As an estimate.

Q. Yes, as an estimate, that is right. And you heard the bell as it passed the caboose. When you saw the automobile, I think you stated it was about 30 or 40 feet east of the main line.

A. East of the house track.

Q. East of the house track? You said it was going eight or ten miles an hour? [444]

(Testimony of Luther L. Griffith.)

A. Yes, I estimate about 8 or 10 miles an hour.

Q. Where were you—well, let me make this a little bit clearer. Will you come down here and put a cross on about where you saw the automobile when it was going 8 or 10 miles an hour?

(The witness left the witness stand.)

Q. I am asking you of the automobile. Where was the automobile?

A. The automobile was in here (indicating).

Q. Was right there. Will you mark there a cross? All right, we will darken that a little bit. I see we already have G-1. We will call this G-2. Where were you when you saw the automobile at G-2? A. About 30 feet behind the caboose.

Q. 30 feet behind the caboose, and that G-1 is the caboose, is that right? A. That is right.

Q. Was that after you had crossed over from the station platform that you were at G—that should be called G-3. You were at G-3 and saw the automobile here at G-2?

A. After I had crossed from this platform.

Q. Did you watch the automobile?

A. Not continually. I may have, something else may have attracted my attention. At the time No. 13 passed the caboose, we are in a position to read the indicator on the engine, then move back so we won't get into it if something should [445] fall off the train as it passed.

Q. What do you remember about this automobile? What kind of automobile was it?

(Testimony of Luther L. Griffith.)

A. I couldn't tell you.

Q. What did you see about it that caused you to identify it as an automobile?

A. Headlights.

Q. It had headlights on, did it? A. Yes.

The Court: It is 12:00 o'clock gentlemen. We will take the usual recess until 2:00 o'clock. In the meantime, ladies and gentlemen, bear in mind the admonition the Court has heretofore given you. Recess to 2:00 o'clock.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [446]

December 28, 1949, at 2:00 o'Clock

LUTHER L. GRIFFITH

resumed the stand, previously sworn.

Cross-Examination

(Continued)

By Mr. Murman:

Q. Mr. Griffith, I think just before the noon hour you were telling us about seeing Mr.—or an automobile over here at G-2 and you at that time were over here at G-3; I think that is correct, isn't it? A. Yes, sir.

Q. Now, you said you saw the automobile because of its headlights, I think that is what you said attracted your attention to it?

A. Yes, sir.

Q. Did you see more than one automobile?

(Testimony of Luther L. Griffith.)

A. Not at that time.

Q. At a later time did you see——

A. No, sir.

Q. At any time did you see more than one automobile? A. No, sir.

Q. Did you see where this automobile that you placed at G-2; you said it was in motion at the time you saw it. Did you see where it went?

A. I noticed it was an automobile when 13's engine hit it.

Q. You saw here at G-2 and next saw it when No. 13 engine [447] hit it? A. Yes, sir.

Q. Now, where was it when you saw the engine hit it?

A. It was—I will have to explain that because Mr. Johnson, the brakeman, was standing with me at the rear of the caboose. I made the remark to him, "If that is a sedan automobile, it hit about the back door of the car, right there in the front—back of the front seat."

Q. You mean, I suppose, by telling us your remark to Mr. Johnson—by the way, he is the brakeman who has left the service? A. Yes, sir.

Q. That you actually saw the engine hit it at about that spot? A. Yes, sir.

Q. Now, when the collision occurred, you were still at G-2, were you not? A. Yes, sir.

Q. And you were looking then at the right side of train No. 13 as it went south? A. Yes, sir.

Q. And you, from your position at G-2, saw the

(Testimony of Luther L. Griffith.)

collision at a point where the train you said hit a little bit to the rear of the right front door?

A. Yes, sir.

Q. Now, will you come down here and mark on this map about [448] where the car was when you saw the engine hit the car a little to the rear of the right front door?

A. Well, the car was on this crossing right here (indicating).

Q. You put a dot there; is that a correct cross as to the dot? A. As near as I can recall.

Q. Yes, all right. I will mark that then G-4. Now, Mr. Griffith, that is where you saw the locomotive hit the automobile, is that correct?

A. Yes.

Q. And the point of contact as you marked it here was at the rear of the right front—

A. Right rear of the front seat.

Q. Right rear of the front seat?

A. Yes, sir.

Q. And you don't know whether it was a sedan or coupe that was hit?

A. No, sir, I didn't know at the time.

Q. Now, did you see the automobile momentarily before the engine hit it? A. No, sir.

Q. Where were you looking at this point before the engine and the car came into collision? I say this point, I mean the G-4 point you designated.

A. Yes, sir.

Q. And what attracted your attention to that point? [449]

(Testimony of Luther L. Griffith.)

A. I made the remark to the rear brakeman——

Q. Just tell me what attracted your attention, not the remark.

A. This car was not stopping when it should, as I figured.

Q. Now, when you told me you couldn't see it from the time you saw it at G-2 until you saw it at G-4; did you see it somewhere in between?

A. No, the engine shut my view off from this point to that point.

Q. Then you don't know, as a matter of fact, do you, that the car did or did not stop in between because you didn't see it?

A. I couldn't say positively.

Q. You didn't see it between those two points, is that right? A. That's right.

Q. But I asked you what caused your attention to be directed at this point.

A. I just happened to turn and look at that point.

Q. I see. If you will take the witness stand again.

Now, between the time, Mr. Griffith, that you saw the car at G-2 and you then later saw it, the collision at G-4, did you remain in the position back of the caboose that you had gone to?

A. Yes, sir.

Q. And you were looking generally in a southerly direction that entire time, is that correct?

A. Yes, sir. [450]

(Testimony of Luther L. Griffith.)

Q. And as you were doing that, the train came along and the engine shut off your view of the east side of the right of way, is that right?

A. That's right.

Q. And the next thing you saw was when the train actually hit the automobile? A. Yes, sir.

Q. Yes. Now, have you any way of specifying as an approximation, not exactly, how much time elapsed while you were at G-3 between the time you saw the automobile here at G-2 and you saw the collision at G-4?

A. I couldn't say exactly.

Q. Well, I don't want you to say exactly, because I am sure anyone standing there couldn't tell you exactly, but I would like an approximation if you can give it to us.

A. I would estimate between one and two minutes.

Q. One and two minutes?

A. One or two minutes, an estimation.

Q. Now, I want to be fair with you, I want to be fair with you. You realize that each minute has 60 seconds in it, don't you? A. Yes, sir.

Q. All right. And you realize, do you not, that this train coming was going 105 feet a second, 70 miles an hour?

A. I don't know what distance he traveled.

Q. But you said you approximated it between 60 and 70 miles [451] an hour; I think it has been testified here that it is 105 feet a second. Now, I

(Testimony of Luther L. Griffith.)

don't want to put you in an awkward position——

A. May I correct it? One or two seconds.

Q. That is what I thought you had in mind. Your best estimate is then it was one or two seconds between the time you saw the car here and when you saw the collision there (indicating)?

A. Yes, sir.

Q. And did you see what happened to the car when the engine hit it?

A. No, I couldn't say just what happened to the car.

Q. Did you see anything in the way of disturbance at the time of contact?

A. I seen lots of fire flying.

Q. You saw lots of fire flying. Could you tell us when you saw the car here, just at the time of the collision, or momentarily before it, whether it still had its headlights on?

A. Yes, sir, it still had its headlights on.

Q. Headlights still on. Now, at the time the collision occurred, was your train starting to move?

A. My train started to move about the time, or just a little after the time, the car was hit.

Q. So the movement of the freight northward was almost concurrent with the actual collision here at the crossing?

A. Yes, sir. [452]

Q. And as I understand it, you swung aboard your caboose and went up towards Redding?

A. Yes, sir.

Q. Did you have your full crew on board, so far as you know, everybody got on board?

(Testimony of Luther L. Griffith.)

A. What we call the swing man, the third brakeman, was up along the train.

Q. You picked him up?

A. We picked him up and pulled out.

Q. Now, when you saw the car at G-2, did you continue to look at it until the moving engine cut your view off from it? A. Yes, sir.

Q. So that when you saw the engine then it was because it came in between you and the car here, G-2? A. That's right.

Q. Did you hear any whistle in this area of the station at the crossing as the train cut off your view?

A. The whistle was blowing continually.

Q. Tied the cord down?

A. Placed as a crossing whistle.

Q. The whistle was being blown continuously.

A. That is with spacing of a crossing whistle.

Q. Well, I suppose by that you mean it was blown separately for each crossing, but continuously as the crossings were approached? [453]

A. That's right.

Q. At least that is what you heard?

A. That is what I heard.

Q. Yes. By the way, when did you last see Mr. Johnson, the brakeman who is missing?

A. That is the last time I saw Mr. Johnson, was that trip that he made with me.

Q. You don't know when he actually left the service of the railroad?

(Testimony of Luther L. Griffith.)

A. He is not in the service at Dunsmuir at this time.

Q. But you don't know when he left?

A. I don't know when he left.

Mr. Murman: I have no other questions.

Redirect Examination

By Mr. Phelps:

Q. You referred to the spacing of a crossing signal. In the blowing of a crossing whistle, is there one continuous sound or is it broken up into shorts and longs?

A. Broken up into shorts and longs.

Q. So that when you say the spacings, what have you in mind then, what do you mean to indicate to the jury? What is a crossing whistle, what is—how is it sounded; how many shorts and how many longs?

A. One long, a short and two longs.

Q. One long, a short and two longs?

A. Yes. [454]

Q. That is done for each crossing?

A. Each crossing.

Q. Now then, directing your attention to the time, if I understand it, you were over on the station platform, that would be on the east side of the track as 13 was coming down the track?

A. Yes, sir.

Q. Now, when you were over there on the station platform, directing your attention to that time

(Testimony of Luther L. Griffith.)

and when you were not looking at the wig-wag and what Mr. Murman describes as a "profile" view, directing your attention to that time when looking at it diagonally, rather than end on, can you tell us whether or not you could observe the light of the wig-wag burning at that time?

A. I am positive that the light of the wig-wag was burning at that time.

Q. All right.

Mr. Phelps: I have no other questions.

Recross-Examination

By Mr. Murman:

Q. Well—the train was coming down the track when you were standing here on the platform and you say you saw the light burning?

A. I think I was—I crossed over the track before or at the time the train was from 1000 to 1500 feet away from me.

Q. I think you testified before lunch that you, as you crossed [455] over, the train was about 500 feet beyond or north of the North Street crossing; I think if I remember your testimony correctly?

A. That's right.

Q. Now, at the time you looked over, you say you saw the light burning here in the wig-wag. Was the train just beyond that point; did you immediately cross over after you saw that?

A. I couldn't say just exactly the point the train was at when I crossed over.

(Testimony of Luther L. Griffith.)

Q. You have already fixed that, Mr. Griffith, on that 500 feet point, but what I am asking you is, before you crossed over, now, while you were still on the platform, can you tell us how far the train was north of the North Street crossing?

A. I couldn't say just how far it was.

Q. But you crossed over immediately, did you, when you say you saw the signal over here and went over to G-3, did you? A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no other questions.

Mr. Phelps: May this witness be excused, your Honor?

Mr. Murman: Yes.

The Court: All right, you are excused.

Mr. Phelps: Call Mr. Andree. [456]

ALEX M. ANDREE

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Alex M. Andree.

Direct Examination

By Mr. Phelps:

Q. Mr. Andree, where do you live?

A. Anderson.

Q. How long have you lived in Anderson?

A. Well, we have been in business in Anderson about 20 years.

(Testimony of Alex M. Andree.)

Q. And what is your business in Anderson?

A. It is soft drinks, ice cream, and we also handle beer and a few groceries, crackers and stuff like that, pies, cakes.

Q. Is that your own business or are you employed by somebody?

A. No, it is my own business.

Q. Do you have a little store that you operate at Anderson, in the town of Anderson?

A. That's right.

Q. And how long have you run that store in Anderson?

A. About 20 years.

Q. Mr. Andree, in living in Anderson for 20 years, can you tell us whether or not you, during that time, have become acquainted with Mrs. Nelda Shanahan?

A. Yes.

Q. And how long have you known her? [457]

A. Why, I have known Mrs. Shanahan ever since she was a small girl.

Q. And were you acquainted during his lifetime with Mr. Ellis Shanahan?

A. I knew Mr. Ellis Shanahan.

Q. And how long have you known him?

A. I have known Mr. Shanahan perhaps 20 years since I have lived in Anderson.

Q. Mr. Andree, will you tell us where your store is located?

A. It is about the center of the town of Anderson, right on the highway.

Q. What highway is it, 99?

A. 99.

(Testimony of Alex M. Andree.)

Q. And where with relation to Ferry Street?

A. I didn't get you.

Q. Ferry Street, do you know where Ferry Street is?

A. About 200 feet below, south of us. We live about half way between Ferry and North Street, that is one block.

Q. I see. You say Ferry Street is 200 feet south of your store? A. That's right.

Q. And your store fronts right on the highway 99? A. That's right.

Q. Now, Mr. Andree, will you step down here and see this, you can help us here. This is a map which, while it has nothing on the highway side of the town of Anderson, it shows the [458] station. You recognize that, and it shows the Howard Street crossing here (indicating), Ferry Street crossing with the firehouse opposite it, and over here is the North Street crossing with the store up there.

A. Yes.

Q. Your store then is located somewhere between Ferry Street and North Street about 200 feet north of Ferry Street?

A. Well, it is about the center, would be about the center of the block, maybe not quite.

Q. Maybe not quite. Will you indicate to us where approximately your store is with relation to Ferry Street and North Street on the highway?

A. We probably would be—let's see, there is—we're probably right in here somewhere (indicating).

(Testimony of Alex M. Andree.)

Q. You have indicated right on the track. Do you mean in relation this way it is about that far away north of Ferry Street (indicating)?

A. That's right.

Q. And of course up on the other side of the highway? A. Yes.

Q. All right now, where did you indicate south of Ferry Street? Will you do that again so I won't be in any error here?

A. Let's see, this is Ferry Street, isn't it, here (indicating)?

Q. Yes.

A. Well, we be about right in here somewhere (indicating). [459]

Q. Now then, hurrying that line up, your store would be somewhere in this area in here?

A. Just about.

Q. Will you put a dot approximately where you think it is?

A. Well, near as I can (indicating). There is a garage in there. I would say we was right here (indicating).

Q. All right, I will make a dot there. Mr. Andree, I am going to go over that dot to make it larger and draw a cross there. I am drawing out a line from that and marking it A-1 to indicate the approximate place of your store. A. All right.

Q. Will you take the stand again, now?

Mr. Andree, do you remember the morning of December 27, 1948, when Mr. Ellis Shanahan was

(Testimony of Alex M. Andree.)

involved in an accident down at Howard Street in his automobile; do you remember that occasion?

A. I do.

Q. On that day, Mr. Andree, approximately what time had you gone to your store to open up?

A. Well, I usually come in there about 7:00 o'clock and do my sweeping, sweep the sidewalk.

Q. All right.

A. And do a lot of work inside, you know. Around 7:00 o'clock I generally have the door open, probably a little later.

Q. Now then, can you tell us whether or not you observed the [460] approach and passing through of the train No. 13 southward through Anderson?

A. Yes, there was a freight on the siding.

Q. And you remember 13 coming through?

A. I remember 13 coming through.

Q. Can you tell us approximately what time that was?

A. Well, it was around between, I would say, half past seven, quarter to eight, probably a little before that, about my opinion what it was—I know it was late that morning.

Q. All right. As that train came down, came into Anderson, what was it about that train that attracted your attention to it?

A. Well, the whistles.

Q. The whistles. And what kind of whistles did you hear and where were they?

A. The first I heard was a station whistle, I

(Testimony of Alex M. Andree.)

guess what they call it, for the town, the first one, that big long whistle for the station.

Q. Did you hear a whistle for any crossings north? A. Another crossing above there——

Q. I am sorry——

A. (Continuing): They whistled for that crossing.

Q. What crossing is that?

A. That is the one between——there is two crossings up there between——between Spring Creek. There is one crossing this [461] side and another crossing between the Signal Oil, the crossing there and the next crossing is North Street.

Q. All right, did you hear the train blow for those crossings? A. I did.

Q. You did. And did you hear the train blow for the other crossings in the town of Anderson?

A. Yes, he blew for North Street and the time he got down to Howard Street he opened her up again on Ferry Street, and it was still, still whistling when I walked into the house. I didn't pay much attention. I know there was a freight train to pull out, the whistle was still blowing out after he went through Ferry Street and I went inside.

Q. You went inside?

A. I went inside. I didn't pay no more attention to it.

Q. Can you tell us whether or not you saw the accident? A. I didn't see the accident.

Q. Now then, when did you first learn that there was an accident?

(Testimony of Alex M. Andree.)

A. Well, about a quarter to eight, or eight o'clock, one of the boys from the mill stopped in and told me there had been an accident, but I didn't know who it was at the time.

Q. Now, between that time, the time when you heard that train going through Anderson and the time when you were advised that there was an accident, did any other trains go through the town of Anderson? [462]

A. None that I seen.

Q. Now then, Mr. Andree, with reference to the train in the siding, freight train in the siding, can you tell us whether or not the cars of that train were freight cars or passenger cars?

A. They were freight.

Q. And can you tell us whether or not they were mixed cars?

A. Well, some up front and here between North Street were mixed cars; most of them were box cars there.

Q. Were some of them flat cars and gondolas?

A. I think so.

Q. Yes. Now then, Mr. Andree, as train 13 came through, did you at any time see the headlights of the train?

A. Yes, I noticed the headlights.

Q. And were they burning?

A. Well, I could see the top of the light over the other cars, they were still burning.

Q. And could you see that through the freight train and as it passed by the mixed train, the gondolas?

(Testimony of Alex M. Andree.)

A. Down the line there is quite a swell and you can see the engine, see the lights on the engine.

Q. Can you tell us whether or not the headlight on the locomotive cast a beam of light ahead?

A. Straight ahead as far as I noticed.

Q. And can you tell us whether or not you heard the train [463] before you saw the headlight?

A. Well, I heard the whistle.

Q. Now, Mr. Andree, so far as you are concerned and confining yourself strictly to what you saw that morning, did you or did not observe the wig-wag in that direction?

A. What light?

Q. The wig-wag down on Howard Street; do you know whether or not it was working? Did you pay any attention to it?

A. Well, they haven't—they had one at Howard Street, one on North Street was working——

Q. I am talking about Howard. Do you know whether or not it was working, did you look in that direction?

A. On Howard Street, no, I couldn't see that far, see, I went inside.

Q. And you didn't look in that direction?

A. The North Street wig-wag was working.

Q. Did you look in that direction after the train passed in front of you?

A. Toward North Street?

Q. No, towards Howard Street.

A. Yes, I could.

Q. But did you, is the point.

A. What is it?

(Testimony of Alex M. Andree.)

Q. Did you on that morning look down the track in a southerly direction? [464]

A. No, I didn't turn around and went inside after the train went by.

Q. So you made no observation one way or the other? A. That's right, I didn't.

Q. Now, Mr. Andree, do you have any recollection in addition to the blowing of the whistle, do you have any recollection of hearing the engine bell? A. Yes, the bell was ringing.

Q. You can remember that?

A. Yes, it was ringing.

Q. And you did hear it?

A. I heard it, all through the little bells on the signal part on the North Street.

Mr. Phelps: I have no other questions.

Cross-Examination

By Mr. Murman:

Q. You say you heard the bells on the North Street? A. Yes, got a wig-wag there.

Q. Did you hear any bell coming from the direction of Howard Street?

A. No, I couldn't hear that, I didn't pay no attention to it. That is a little too far away.

Q. You weren't paying special attention to the North Street crossing lights, were you?

A. What? [465]

Q. You weren't paying special attention to——

A. No, I wasn't paying much attention to it,

(Testimony of Alex M. Andree.)

only I say the lights and the whistle and the bell.

Q. You did hear the bell from North Street?

A. Yes.

Q. But you didn't hear any coming from Howard Street?

A. I didn't pay no attention. I know the North Street was ringing.

Q. You weren't paying attention to North Street, were you?

A. Well, but you could hear it, it was much closer.

Q. You could hear it. You say you saw just one headlight?

A. Just the top beam.

Q. Just the top beam?

A. Couldn't tell one or two, one headlight straight ahead.

Q. Was shining down on the track?

A. Well, you know about the beam of a locomotive.

Q. No, I don't know about the beam of a locomotive. You mean it was shining ahead of the train?

A. It was shining ahead of the train, yes.

Q. Was it misty that morning, or clear?

A. No, it wasn't misty. It was, well, it was about the weather we have got now.

Q. We don't live up there, Mr. Andree.

A. Well, it is cold, I know, and——

Q. Hadn't it been raining? [466]

A. I think it rained the night before, or a day or two before. I have forgotten now.

(Testimony of Alex M. Andree.)

Q. You are sure this is the December 27 that you are remembering about? A. Yes, December.

Q. December 27, 1948? A. Yes.

Q. You are sure you got the right day in mind?

A. I got the right day, it was in December.

Q. No doubt about that? A. December.

Q. Of course there are a lot of days in December.

A. Yes, but I couldn't—I have just forgotten what day it was.

Q. How long after Christmas was it?

A. I just have forgotten, whether it was two or three days——

Q. You don't remember whether it was two or three days after Christmas? Has there been more than one accident at Howard Street?

A. No, it was before Christmas.

Q. Before Christmas? A. I think.

Q. More than one accident at the Howard Street crossing?

Mr. Phelps: I will object as incompetent, irrelevant and immaterial. [467]

Mr. Murman: The witness is talking about an accident that he didn't see.

Mr. Phelps: Ask him if it was the accident in which Mr. Shanahan was killed. He knows Mr. Shanahan. Fix it that way. I object to any other evidence, if your Honor please.

The Court: You can clear it up on redirect.

Q. (By Mr. Murman): Did you understand the question, Mr. Andree? A. I didn't hear it?

(Testimony of Alex M. Andree.)

Q. Were there other accidents at that Howard Street crossing? A. There have been.

Q. And you are not sure whether this was before Christmas or after Christmas that you are talking about; is that right?

A. It was before Christmas.

Q. You are sure of that? A. Yes.

Q. Before Christmas a year ago?

A. Before Christmas.

Mr. Murman: No further questions.

Redirect Examination

By Mr. Phelps:

Q. Now, Mr. Andree, you are clear on one thing, are you, this is the accident in which Mr. Ellis Shanahan was the man who was killed, is that right? [468]

Mr. Murman: Just a moment. This witness testified he didn't see the accident. This calls for hearsay.

The Court: Oh, overrule the objection.

Mr. Phelps: Will you read the question, Mr. Reporter?

Mr. Murman: The Reporter who has the question is just leaving the room.

Mr. Phelps: I will reframe the question, if your Honor please.

Q. You are clear on this, are you not, that the accident that you are testifying about was the accident in which Mr. Ellis Shanahan, a man you know,

(Testimony of Alex M. Andree.)

and knew before this, was killed on that morning?

A. That is right.

Q. No question in your mind about that?

A. That is right.

Q. Regardless of whether it was a day or two before Christmas or a day or two after Christmas?

A. That is right.

Mr. Phelps: I have no further questions.

Recross-Examination

By Mr. Murman:

Q. You didn't see the accident, did you?

A. No.

Q. Did you go down and look at the automobile afterwards?

A. I didn't know anything about it until about 8:00 o'clock. No, I didn't go down. [469]

Q. All you know is what somebody told you, is it?

A. What somebody told me.

Mr. Murman: That is all.

Redirect Examination

By Mr. Phelps:

Q. I take it, it was pretty common knowledge in the town of Anderson that Mr. Ellis Shanahan was killed?

Mr. Murman: Oh, I object to that, if Your Honor please.

The Court: Well, I will allow it. He asked you, it was common knowledge in the town that Mr. Shanahan was killed?

A. Yes.

(Testimony of Alex M. Andree.)

Q. (By Mr. Phelps): This was the day of the accident of which it was common knowledge in the town of Anderson that Mr. Shanahan was killed?

A. That is right.

Mr. Phelps: No further questions.

Mr. Murman: No further questions.

Mr. Phelps: May this witness be excused?

Mr. Murman: No objection.

Mr. Phelps: Oh, by the way, you came here pursuant to subpoena, did you not? I forget to ask you.

A. What?

Q. You came here pursuant to a subpoena?

A. That is right. [470]

JOHN HENRIS

called on behalf of the defendant; sworn.

The Clerk: Will you please state your name to the Court and jury?

A. John Henris.

Direct Examination

By Mr. Phelps:

Q. Mr. Henris, where do you live?

A. Klamath Falls.

Q. How long have you lived there?

A. Eight years.

Q. Now, Mr. Henris, what is your business or occupation?

A. Conductor on the Southern Pacific.

Q. How long have you been employed as a conductor on the Southern Pacific?

(Testimony of John Henris.)

A. 23 years as a trainman, 13 years as a conductor.

Q. When were you promoted to conductor?

A. 13 years ago.

Q. Prior to that as a brakeman, is that right?

A. That is right.

Q. Had you had any other railroad experience before that? A. No.

Q. What division have you worked on?

A. Coast division and the Shasta Division.

Q. When did you first go to work on the Shasta Division? A. 1941. [471]

Q. Trade your rights with somebody else——

A. That is right.

Q. ——on the Coast Division for the Shasta Division? A. That is right.

Q. Mr. Henris, on December 27, 1948, can you tell us whether you were a member of a crew involved in an accident at Anderson, California, when Mr. Shanahan was killed? A. I was.

Q. What was your position in that crew?

A. I was conductor.

Q. What was your train number?

A. No. 13.

Q. Where had you gone on duty that day?

A. Klamath Falls, Oregon.

Q. And where were you headed for? What was your terminal point, that is, as conductor?

A. Gerber.

Q. Gerber. Now, then, Mr. Henris, do you remember the number of cars you had that day?

(Testimony of John Henris.)

A. We had 15 cars.

Q. Do you remember how many of those cars were head end equipment?

A. We had two head end cars, five coaches—let's see, one lounge and a diner.

Q. And the rest were Pullman? [472]

A. Pullmans.

Q. Now, what do we mean by head end?

A. They are baggage cars, have baggage and mail and express.

Q. And no other cars? A. No.

Q. Now, then, Mr. Henris, coming out of Redding, will you tell us approximately what time in the morning it was when you left Redding, if you know? A. Oh,—

Q. If you don't remember, that is all right; I will try to fix it.

A. I don't remember right now.

Q. But at any rate, on the morning of the 27th; after your train had left Redding and was approaching Anderson, where were you riding in the train?

A. I was back in the eighth car, the lounge car.

Q. What were you doing back there?

A. I went back there to get a ticket from a passenger that got on at Redding.

Q. Were you doing anything else in connection with that, doing any work?

A. No. I was talking to him just there, no work.

Q. All right, then, what was your first indication,

(Testimony of John Henris.)

to you, that there had been an accident on the train on which you were riding? [473]

A. Well, I felt the brake applied.

Q. Prior to that, and while you were riding where you were, had you paid any attention at all to the whistles, and so forth, and bells of the train?

A. Not particularly, no.

Q. As you sit there now, do you have any recollection one way or the other in that respect?

A. Well, I haven't, no. I didn't pay any attention to it. I didn't pay any particular attention.

Q. Now, then, when you were coming—withdraw that. When you felt the brake applied, can you state whether or not that was, in your experience, an emergency application or another kind of application? What was it?

A. No, that was an emergency application.

Q. What did you do after you felt the brakes go into emergency?

A. Well, I more or less hesitated and hung on to something to see what was going to happen. I didn't know if the train was going to part or just what would happen.

Q. The emergency brake, when they go on, it could be because the engineer applied them in emergency or because the train had broken in two?

A. That is right.

Q. Or had derailed or any one of a number of reasons? A. That is right.

Q. The air brakes are so set up they are automatically applied [474] if anything goes wrong?

(Testimony of John Henris.)

A. That is right.

Q. And when the brakes go on, I take it you, as a railroad man, you hang onto something to find out what is going to happen?

A. That is correct.

Q. Mr. Henris, after the train came to a stop at Anderson, what did you do?

A. Well, I walked up as near as I could to the head end and opened the vestibule door and got down on the ground and went up to the engine and asked the engineer what happened, and he told me we had struck a car at the crossing.

Q. Then what did you do?

A. Well, then, I looked around at the engine, then proceeded back, looking the train over, and went back to where the accident occurred.

Q. When you got up there, what did you do? When you got up to where the automobile was, what did you do?

A. Well, I looked around and saw the driver of the car. I felt his pulse to see if there was any life there or anything, then I went up and reported to the dispatcher, went up to the depot and called up the dispatcher and told him about it.

Q. And asked for an ambulance and the police?

A. Yes.

Q. While you were there at the scene of the accident, was there any other—when you arrived there, were there any other people [475] around?

A. Well, when I was there, there were three or four people there.

(Testimony of John Henris.)

Q. After you came back from the station—is that where you called the dispatcher?

A. That is right.

Q. That is the station shown on this map?

A. Yes.

Q. After you came back from the station after calling the dispatcher and telling him to secure an ambulance and the police, did you at that time make any observations as to who was present?

A. Well, I see a highway patrolman, and then the ambulance was there with an attendant and the driver, and there were quite a few people there.

Q. This was later? A. Yes, on my return.

Q. I am talking about before. When you returned, had the ambulance already then arrived, when you returned? A. Yes, it had.

Q. Where did your rear brakeman go, do you know of your own knowledge now?

A. Well, yes, he proceeded back flagging.

Q. What is his duty in that respect? What is the purpose of going back flagging? [476]

A. Well, so that any following trains won't hit our train. We have to be protected any time we are on the main line.

Q. Any time you are standing on the main line you have to be protected against any trains following? A. That is right.

Q. Approximately how far, if you can tell us, was the automobile from the Howard Street crossing?

(Testimony of John Henris.)

A. Well, this would just be an estimate. I haven't any way—I don't know exactly.

Q. Yes, I know you didn't measure it, but what is your best estimate as far as you can tell us?

A. Around 100 feet, I would say.

Mr. Phelps: I have no further questions of this witness. You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Henris, is that the way you pronounce your name? A. That is right.

Q. The automobile that you saw was to which side of the right of way, having in mind that the map we have here shows north to your right, south to your left, west to the top and east to the bottom.

A. Yes. Well, it was on that side next to the highway.

Q. Do you recall where it was in connection with this switch standard here? Can you see it from where you are? [477]

A. Yes. Here is the crossing.

Q. Come down to the map. Maybe it will be easier for you.

(The witness left the witness stand.)

Q. As I understand it, this is a map prepared by the Southern Pacific Company. This is the Howard Street crossing here and what they call the switch standard for the west siding, and apparently the

(Testimony of John Henris.)

accident happened at this crossing. About where did you find the automobile, would you say?

A. Well, I would think it would be about in here (indicating).

Q. Do you want to make a mark there? We will call that H-1. Was the body off—well, you didn't know Mr. Shanahan?

A. No, I didn't.

Q. You did see the body there?

A. Yes.

Q. Was that beyond the automobile or was it short of the automobile in relation to the crossing?

A. Well, it would be short of the automobile in relation to the crossing.

Q. Do you want to mark that where you remember seeing the body?

A. I would say about here (indicating).

Q. Is that about right?

A. I think so.

Q. We will call that H-2. Will you resume your seat now?

(Witness resumed the stand.)

Q. I show you plaintiff's exhibit 7. Do you recall whether or [478] not that photograph looks about the way the car was when you saw it? Of course it is in a different position there, but I am just directing your attention to the automobile itself.

A. Well, I think that is about the condition of it all right.

Q. Did you look at it closely at all or just observe it rather generally?

A. No, I didn't pay particular attention to the automobile.

(Testimony of John Henris.)

Q. Can you tell us anything about the window on the left side of the door there? Do you remember anything about the left door window?

A. No, sir, I do not, no.

Q. And you said you felt the pulse of the body, and you found no pulse, is that right?

A. That is right.

Q. It was the engineer that reported to you that the train had struck an automobile, is that correct?

A. That is correct.

Mr. Murman: No further questions.

Mr. Phelps: I have no other questions.

The Court: That is all.

Mr. Phelps: May this witness, then, be excused?

Mr. Murman: Yes.

The Court: Yes.

Mr. Phelps: You may be excused.

(Witness excused.) [479]

TED STEPHENS

called as a witness on behalf of the defendant,
sworn.

The Clerk: State your name to the Court and jury, please.

A. Ted Stephens.

Direct Examination

By Mr. Phelps:

Q. Mr. Stephens, where do you live?

A. Klamath Falls.

Q. And by whom are you employed?

(Testimony of Ted Stephens.)

A. Southern Pacific.

Q. In what capacity? A. Train service.

Q. And what do you mean by train service?

A. That is the transportation department, as a brakeman.

Q. Are you promoted to a conductor or not?

A. No.

Q. How long have you worked as a brakeman for the Southern Pacific?

A. Just a little over eight years.

Q. On what division? A. Shasta Division.

Q. Now, then, were you a member of the train crew which was involved in an accident at Anderson, California, on December 27, 1948?

A. I was. [480]

Q. In which an automobile was struck at the Howard Street crossing? A. That is right.

Q. What was the number of your train?

A. 13.

Q. Who was your conductor?

A. John Henris.

Q. And who was your head brakeman?

A. Caillouette.

Q. What was your position on the crew?

A. Flagman.

Q. Do you have another man?

A. Well, the rear brakeman.

Q. Rear brakeman? Do you remember the number of cars? If you remember, fine, and if you don't remember the number of cars in your train——

(Testimony of Ted Stephens.)

A. Well, I couldn't say that I remember the amount of cars that we had——

Q. All right.

A. ——except I have heard others say.

Q. Well, let's not get into hearsay. If you don't, that is all right. We will establish that another way.

A. Yes, sir.

Q. Now, Mr. Stephens, on this train you had gone on duty where? At Klamath Falls? [481]

A. At Klamath Falls.

Q. You had ridden this train all the way through to the point of the accident at Anderson?

A. That is right.

Q. And intended to ride it on to where?

A. Gerber.

Q. That is where you terminated your run?

A. Yes, sir.

Q. Now, then, as you left Redding, was that the last stop before Anderson?

A. It was.

Q. After that last stop before Anderson and as you left Redding, where were you riding as you were approaching the town of Anderson?

A. In the rear car, in the smoking room.

Q. All right. And what was it that, as far as you personally were concerned, that called your attention that anything unusual had happened at Anderson?

A. The brakes were applied.

Q. And how were they applied?

A. Well, I can say as to my experience as they were applied in emergency application.

(Testimony of Ted Stephens.)

Q. In other words, they were all set at one time and as fast as they could be set?

A. Yes. That is according to my experience.

Q. Now, then, when you felt that application in emergency, what did you do?

A. I sat down on the seat in the smoking room.

Q. And held on?

A. Yes, and there was a passenger there and I told him to hold on.

Q. Now, then, Mr. Stephens, before that—we only want your personal recollection, no hearsay, not what anybody else has told you, but can you tell us whether or not you made any personal observation, whether you know of your own knowledge, whether you were paying any attention so you could say whether or not there were any whistles sounded that you heard?

A. I wasn't paying any attention and as far as, I didn't hear any whistles sounded as to where I was at.

Q. It is a common thing to you to hear them, and you get so you don't pay any attention, is that right, on your own train? A. Yes.

Q. Now, then, as the train went into emergency and after you sat down, what was the next thing that you did?

A. Well, when the train stopped I got up and got my flagging equipment and opened the trap doors and went back up the track.

Q. And your flagging equipment, what did that consist of?

(Testimony of Ted Stephens.)

A. That is a red light, fusees, torpedoes and a white light.

Q. What was your purpose in going back on that occasion?

A. To protect the rear end of this train. It was my duty. [483]

Q. Was that necessary in your duty whenever a train stops on the main line?

A. Yes. Otherwise then a station stop. We have station stops.

Q. This was not a regular station stop for you?

A. No, it wasn't a regular station stop.

Q. All right. As you walked back, did you come upon the, or see the wreckage of a car?

A. Yes.

Q. Did you see the man, the body of a man there? A. Yes.

Q. Was there someone around there?

A. Yes.

Q. What did you do there? After seeing the man and seeing the persons there, what did you do?

A. I went down towards this body that was there and I looked at it, and this fellow was standing over from it a little ways and I asked him if he was in the car.

Mr. Murman: Just a moment.

Mr. Phelps: Well, let's not get into hearsay.

A. O.K.

Q. (By Mr. Phelps): Mr. Murman can very properly object to it and you are not entitled to say what was said either by him or you.

(Testimony of Ted Stephens.)

A. All right.

Q. After conversation with him, where did you go then? [484]

A. I went on up the track and there was a fellow at the depot.

Q. All right, when you got there what did you do?

A. I told him to tell the dispatcher that we had hit an automobile, and also to call an ambulance and to notify the law.

Q. After you did that, what did you do?

A. I went on up the track from the depot to protect the rear end of my train, as I said, and up at the crossing over there—I guess it is the North Street crossing—there was an automobile started to cross there and I stopped him and told him to go down there to see if he could help out as we had hit an automobile.

Q. Did you stay up there until the train left?

A. Not in this spot. I went farther back.

Q. You went farther back than that?

A. Yes.

Q. How much farther than that?

A. Oh, I imagine around—around, well, I will say around 1000 feet farther back than that.

Q. When you took that position did you stay there until the train—until you were whistled in?

A. I stayed there until I got the signal to come in.

Q. What is that signal?

A. I got a signal with the lantern from the conductor or the brakeman.

(Testimony of Ted Stephens.)

Q. That is for you to come on in, is that correct?

A. Yes, that is right.

Q. That was when you left?

A. That is right.

Q. So that you didn't go over to the automobile and you have done just exactly what you have told us, you went farther back to protect your train?

A. That is right.

Mr. Phelps: I think that is all, but it is three o'clock if your Honor please.

The Court: All right.

Mr. Murman: I have just one question, then we can excuse the witness, if that is agreeable to the Court.

The Court: All right.

Cross-Examination

By Mr. Murman:

Q. You said you took a red light and a white light? A. Yes.

Q. Were they burning when you took them?

A. The red light is burning usually from sunset until sunup, and the red light was burning when I took it.

Q. The white light, was that an electric torch?

A. Yes.

Q. So that you didn't have that burning?

A. That wasn't burning at the time I picked it up, but I turned it on before I went up. [486]

Q. You had it on as you went back, did you?

(Testimony of Ted Stephens.)

A. Yes.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions. This witness may be excused.

The Court: All right.

(Witness excused.)

The Court: We will take a recess now, ladies and gentlemen, for ten minutes. During the recess will you bear in mind the admonition I have heretofore given you.

(Thereupon, a short recess was taken.) [487]

NOEL CAILLOUETTE

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Noel Caillouette.

Direct Examination.

By Mr. Phelps:

Q. Mr. Caillouette, where do you live?

A. Beg your pardon?

Q. Where do you live?

A. Klamath Falls, Oregon.

Q. And by whom are you employed?

A. Southern Pacific Company.

Q. In what capacity?

A. Brakeman and conductor.

(Testimony of Noel Caillouette.)

Q. Now, then, how long have you been employed as a brakeman and conductor?

A. Since—approximately 14 years.

Q. When were you promoted to conductor?

A. 1945.

Q. 1945. May I ask you to explain how the seniority works so that the man is promoted as a conductor—will you tell us under what circumstances he might be working as a brakeman having anything to do with the job?

A. You hold a regular assignment as a brakeman. As they [488] become short of conductors, you are used in the seniority order as a conductor.

Q. So that in 1948 in December you didn't have enough seniority as a conductor to hold a full time conductor's job? A. That's right.

Q. So that you then work as a brakeman?

A. Yes.

Q. Now, then, on December 27, 1948, Mr. Caillouette, were you employed on a crew which was involved in an accident striking an automobile on the Howard Street crossing at Anderson in which Mr. Shanahan was killed? A. Yes, sir.

Q. And what member of that crew were you?

A. I was the head brakeman.

Q. Now, who was your conductor?

A. John Henris.

Q. And where had you boarded that train?

A. Klamath Falls.

Q. I take it that you trainmen ride that train from Klamath clear to Gerber, whereas your engine

(Testimony of Noel Caillouette.)

crew change, they ride from Klamath Falls to Dunsmuir and then a new engine crew takes over at Dunsmuir and rides to Gerber; is that right?

A. That is correct.

Q. Now, so that the train conductor and brakeman work twice as long as the engine crew? [489]

A. That's right.

Q. Get fresh engine crews?

A. That's right.

Q. Now, then, on this day, the morning of this accident, you were head brakeman and as such where were you riding after the train left Redding and as it was approaching Anderson?

A. The rear seat of the first coach on the left side.

Q. Now, then, Mr. Caillouette, your duties as head brakeman require you to do any particular act as your train was approaching the station at Anderson? A. Yes, sir.

Q. And what were you required to do that is different than the engine crew?

A. I am required to open the vestibule door and check the train order boards.

Q. And what is a train order board?

A. Well, a train order board has paddles on it, one for east bound trains and one for west bound trains, that is geographically north and south.

Q. Now, I will show you a photograph which has been marked Defendant's Exhibit L in evidence and ask you if you can identify the train order board at Anderson?

(Testimony of Noel Caillouette.)

A. This is it right here (indicating).

Q. It appears to be a semaphore signal. Is that operated manually or automatically? [490]

A. Yes, manually.

Q. And when it is in the position that it is in the photograph that I have just shown you——

The Court: Let the rest of the jury see it.

Q. (By Mr. Phelps): When it is in the position as indicated in this photograph, what does that indicate? A. Indicates orders for our train.

Q. So that if it is out it would indicate there were orders for your train?

A. And if we didn't get them, we are required to stop the train and get the orders.

Q. If you don't get the orders?

A. That's correct, if we don't get them.

Q. And if no orders were there for you, how would that signal be?

A. The paddle down this way in the direction we were going that day, it would be this paddle here (indicating), which is white from the opposite direction of what we are going and red on the other side as this one here indicates, this paddle, for our train that morning would be down.

Q. So the most westerly paddle was the one you were looking at? Do you remember whether or not you had any orders? A. Yes, sir.

Q. Now, in order to do that you say you have to open the vestibule window?

A. The door. [491]

Q. The door. And did you do that on this occasion? A. Yes, I did.

(Testimony of Noel Caillouette.)

Q. And do you remember whether or not that signal indicated whether or not there were any orders for your train?

A. It was a clear board.

Q. Now, what do you mean by "clear board"?

A. Clear board indicates no orders.

Q. So that you didn't have to stop, is that right?

A. That is correct.

Q. And didn't have to pick up any orders?

A. No, sir.

Q. Now, then, will you tell us approximately where you were, where your train was as you opened up the vestibule door to check the order board?

A. Oh, probably was in the neighborhood of a quarter of a mile from the station.

Q. And after opening up the door did you get your head outside the clearance of the train?

A. Yes, sir.

Q. And then you observed the board. Then what did you do?

A. Closed the door and go in and report to the conductor, if he is there, clear board.

Q. And about how far from the station were you, or how far from the order board were you when you closed the door?

A. Oh, I probably was right opposite the station when I closed [492] it, or a little bit to the north or east, as the railroad trains are operated.

Q. Well, north geographically?

A. Geographically north of the depot.

(Testimony of Noel Caillouette.)

Q. A little bit north of the depot?

A. Just a trifle.

Q. And as you closed the door, did you see the Mars light oscillate?

A. I saw it flash on the buildings about twice.

Q. Had you seen it before that oscillating?

A. No, I can't say that I did before that because I would have nothing for it to reflect on, from where I was standing.

Q. You didn't see it oscillate then before?

A. No.

Q. Now, then, did you hear the crossing whistle sounded at any time? A. Yes.

Q. And where were you when you heard the crossing signal?

A. Standing in the open door.

Q. In the vestibule?

A. In the vestibule door, yes.

Q. And was this before or after you opened the vestibule door?

A. Well, I had the door open somewhere north of the first crossing at Anderson and he was blowing the whistle then.

Q. And by the first crossing in Anderson do you mean—will [493] you step down here so we won't be mistaken here? I show you a map. Here is Howard Street, it is not marked as such, but it is Howard Street here, crossing diagonally from it is your station—— A. Yes.

Q. And incidentally, can you point out to us where that order board is?

(Testimony of Noel Caillouette.)

Q. And do you remember whether or not that signal indicated whether or not there were any orders for your train?

A. It was a clear board.

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Q. And incidentally, can you point out to us where that order board is?

(Testimony of Noel Caillouette.)

A. The order board would be right in here (indicating).

Q. All right. And here is Ferry Street (indicating)? A. Yes.

Q. And then there is North Street with a store?

A. Yes.

Q. And those crossings, and is there another crossing south? A. Yes.

Q. All right, and is there another crossing north of North Street?

A. Well, it is a long ways up there.

Q. All right. Now, referring to the crossing at North Street, is that the crossing you heard his whistle for? A. Yes.

Q. As you had the door open? A. Yes.

Q. And then you rode the train in the vestibule right up until the time you closed the door, did you continue to hear crossing whistles sounded? [494]

A. Yes, sir.

Q. Now, after you closed the door, what did you do?

A. I immediately went inside through the end door of the coach——

Q. All right. A. ——to my seat.

Q. All right. And as you were on your way to your seat did you notice anything unusual in the operation of the train? A. Yes.

Q. What was that?

A. The application of brakes.

Q. And what did you do when you felt that?

A. Well, I realized it was an emergency applica-

(Testimony of Noel Caillouette.)

tion and I immediately went for my seat to sit down because anything can happen under those circumstances.

Q. And after that what happened?

A. We stopped.

Q. The train came to a stop and what did you do when the train came to a stop?

A. I went to the head end of the coach as soon as we stopped, opened the vestibule door on the opposite side of the station, or in other words, the engineer's side, and walked up to see what was the matter.

Q. All right. Before going back again, at any time while you were looking at this order board and before you closed the [495] vestibule door, did you have occasion to look down on the Howard Street crossing, or did you pay any attention to it?

A. Frankly, I can't say that I paid any attention.

Q. You were not able to see any cars there, stopped or otherwise?

A. No, I couldn't.

Q. After the train came to a stop, how many cars, incidentally, were you behind the engine?

A. Well, we had two head end cars that morning and I was in the first coach, which would be the third car.

Q. Now, when you arrived at the head end of the engine, what did you do?

A. Well, I asked Jesse, the engineer, I said, "What happened, Jesse——"

(Testimony of Noel Caillouette.)

Q. Well now, let's not have conversations. What did you yourself do?

A. Well, by that time the engineer joined me on the ground. We walked up to the front of the engine and on the side of the pilot beam hanging on the end of the pilot beam was the door of a car.

Q. All right, what did you do with that?

A. Took it off.

Q. Now, did you make any observation as to whether or not the bell was ringing at that time?

A. The bell was still ringing after we had stopped. [496]

Q. Did you make any observation as to whether or not the headlights were on when you went around the front? A. Yes.

Q. And did you make any observation as to whether the Mars light was oscillating?

A. Yes.

Q. Was it or was it not?

A. It was oscillating.

Q. Did you make any observation as to whether the other headlight was on or off?

A. It was on.

Q. Now, then, after that, after you did what you just told us at the head end, did you leave then?

A. I went to the rear of the train and on down the track.

Q. And how far down the track did you walk?

A. Well, the engine was somewhere in the neighborhood of the 50-car board. That would be from the siding switch, that mark, and the engine

(Testimony of Noel Caillouette.)

was a little south of the 50-car board, so that would be how far back I walked.

Q. You walked that distance back?

A. Yes.

Q. And did you come upon anything at all?

A. Well, before we got to the crossing we could smell gasoline and then I saw a car off to the side.

Q. And what did you do when you got there?

A. Well, went to the car, looked at it, just glanced at it, and saw a man laying there on the ground.

Q. Did you go over to him? A. Yes.

Q. And what did you do?

A. Well, there was one or two of the other fellows standing there and I asked who he was——

Q. You can't tell us as to any conversation, Mr. Caillouette.

A. Well, there was some papers laying on his hip, his left hip, and I looked at them and the top one was the gas credit card with a name on it.

Q. What was that name?

A. Ellis, I think it was Ellis P., I am not sure, but Shanahan was the last name.

Q. Did you stay around there, or did you go some place?

A. The conductor instructed me to stay there until he came back.

Q. And you stayed right there? A. Yes.

Q. Were you still there when the highway patrol officer came? A. Yes.

Q. And do you know him? A. Yes.

Q. And did you recognize him?

(Testimony of Noel Caillouette.)

A. Oh, yes.

Q. And what is his name? [498]

A. Floyd Sublett.

Q. Did you see him around here when he came down to testify? A. Yes.

Q. You recognized him as the officer you saw?

A. Yes, definitely.

Q. Now, then, can you tell us whether or not you made any examination of the automobile with Mr. Sublett? A. Yes.

Q. And when you did that did you make any observations, if you can tell us, did you make any observations as to the lefthand window on the car as to whether it was up or whether it was down?

A. On the lefthand side?

Q. On the lefthand side.

A. The driver's side, the window was up.

Q. All right. [499]

Q. On the opposite side, that was the door that you had taken off of the pilot? A. Yes, sir.

Mr. Phelps: You may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mr. Caillouette, when you looked out for the order board, what was the condition of visibility?

A. Well, it was about twilight, breaking day.

Q. Breaking day?

A. Yes, what you would ordinarily term as twilight.

Q. You could see the order board?

(Testimony of Noel Caillouette.)

A. Yes. Could also see the light.

Q. In addition to the board being a paddle, as you call it, it also had a lighting signal?

A. That is correct.

Q. Now, what did it show, a white light?

A. Green.

Q. Green light. Red light would have been a stop light? A. That is correct.

Q. It was a green light?

A. That is correct.

Q. How about the weather? Did you notice the condition of the weather?

A. Oh, it was kind of misty.

Q. Could you see the mist? [500]

A. Well, I would say yes.

Q. Do you know anything about the speed of the train as you looked out for the order board?

A. Well, I personally happened to check him before we got to Anderson.

Q. When you say checked him, you mean checked the engineer?

A. Checked the speed of the train.

Q. What did you find the speed to be?

A. About 69 miles an hour.

Q. That was north of Anderson?

A. Just north of Anderson.

Q. And there is a slight downgrade into Anderson, is there?

A. We were on that at the time when I checked it. That was on the last mile out of Anderson.

Q. Of course, you didn't see the accident hap-

(Testimony of Noel Caillouette.)

pen? You had already closed the vestibule door, hadn't you? A. That is correct.

Q. You were looking out the left side of the train as you looked for the order board?

A. That is correct.

Q. You didn't look out the right side at any time? A. No.

Q. Now, when you checked the wreck of the car with Mr. Sublett, did you look at that left door at all or just glance at it?

A. I personally opened the door. [501]

Q. It was still able to swing on its hinges?

A. Mr. Sublett and I both opened the door.

Q. How was the car lying?

A. It was lying straight up.

Q. You went around it to the left side and opened the door? A. Yes, sir.

Q. Did you try it to see whether the windows would run up or down? A. No, sir.

Q. When you say it was up, you mean it was all the way up? A. Yes, sir.

Q. Up to the top? A. Yes, sir.

Q. Did the door have any dents in it or damage of any kind that you noticed?

A. Well, frankly, I couldn't tell you definitely on the door.

Q. Did you have some lights with you at the time?

A. Oh, I might have had my lantern in my hand but I don't believe I had it lit because it wasn't necessary.

(Testimony of Noel Caillouette.)

Q. You could see without the lantern?

A. Yes.

Q. It still wasn't daylight, though, was it?

A. It was, as I stated before, sort of twilight.

Q. Kind of a daybreaking light, is that it?

A. Break of day had already shown on the hill, horizon. [502]

Q. What kind of day was it? Was it cloudy or a clear day?

A. I already stated it was misty.

Q. Misty? A. That is correct.

Q. But you could see the daylight breaking?

A. Oh, yes.

Q. You didn't check that left door carefully, did you? Just looked at it, saw the window was up and opened the door, is that right?

A. I personally opened the door. I opened the door for Mr. Sublett to look in and ascertain whose car it was on the register slip.

Q. Did you check the light switch for the headlights on the instrument panel of the car?

A. No, sir.

Q. Did you notice as to whether there were any lights burning? A. No, sir.

Q. You don't recall seeing a tail light burning?

A. No, sir.

Mr. Murman: I have no further questions.

Mr. Phelps: I have no questions, your Honor.

May this witness then be excused, also?

Mr. Murman: Yes.

The Court: Yes.

Mr. Phelps: Thank you. You may be excused.

LELA JOHNSON

called on behalf of the defendant; sworn.

The Clerk: Will you please state your name to the Court and jury?

A. My name is Lela Johnson.

Direct Examination

By Mr. Phelps:

Q. Mrs. Johnson—is it Miss or Mrs.?

A. Mrs. I am married.

Q. Mrs. Johnson, where do you live?

A. Anderson, California.

Q. How long have you lived in Anderson, California? A. About eight years now.

Q. By whom are you employed?

A. Rafael Sneff Lumber Company.

Q. What do you do there?

A. I cook for the office men and then I do the janitor work.

Q. Mrs. Johnson, have you lived in the same place in Anderson now and in December, 1948?

A. Yes, sir, same place.

Q. So that on the morning of December 27, 1948, you lived in Anderson, is that right?

A. Yes, sir.

Q. Will you tell us whereabout you live?

A. I live on Douglas Street in Anderson.

Q. Now, Mrs. Johnson, I am going to show you a photograph [504] which has been introduced in evidence, Defendant's Exhibit L, and ask you if you

(Testimony of Lela Johnson.)

can show us in that photograph where your house is. See if you can point it out.

A. Would you mind if I got my glasses?

Q. Surely.

A. I read a great deal, so I have got to use my glasses.

Q. Do you use glasses for reading?

A. Just reading, that is all.

Q. Do you use glasses for distance?

A. No, sir.

Q. All right.

A. Now. This is my house sitting right back in here.

Q. Where I am pointing, Mrs. Johnson?

The Court: Let the jurors see it.

Mr. Phelps: Yes, I was going to mark it, if I could, here.

Q. You are pointing to a house right there, is that it?

A. Yes, sir, right there, that is it.

Q. Let me mark it on that photograph with an arrow down to your house. Is that arrow now pointing down to your house?

A. Yes, sir, right down to my house.

Q. All right. Now, I will put a designation on that, "J-1," on the photograph, with a line and arrow drawn down to your house.

A. Yes, sir, this line comes right down to my house.

Q. All right, Mrs. Johnson, is that the house you

(Testimony of Lela Johnson.)

lived in on [505] the morning of December 27, 1948?

A. Yes, sir.

Q. Now, will you tell us from the front yard of that house whether you have a view of the Howard Street crossing?

A. Well, it is just about a block, I guess, from my house to—you mean to the Howard Street crossing?

Q. Yes.

A. Yes, sir. Why, just about a block.

Q. All right, Mrs. Johnson. Do you remember an incident where an automobile was struck which was driven by Mr. Ellis Shanahan?

A. Yes, sir.

Q. And in which he was killed at the crossing, the Howard Street crossing in the town of Anderson?

A. Yes, sir.

Q. You do remember that?

A. Yes, sir, I do.

Q. Did you see that accident?

A. Yes, sir, I did.

Q. Now, Mrs. Johnson, where were you at the time that you saw that accident?

A. I was standing outside of my gate. I had came out of my house that morning to get some wood to build me a fire and I heard the train coming and so I did stop and look as usually I do, and I was outside the gate in my wood yard at the time [506] the accident happened.

Q. You like to watch the trains go by?

(Testimony of Lela Johnson.)

A. Yes, sir, especially when she going south.

Q. Now, then, on this occasion you did stop and watch the train go by?

A. Yes, sir, I sure did.

Q. Now, what was that that attracted your attention to the train? Did you hear any whistles before that?

A. Well, as I was coming out my yard, I heard a train come away up the track, and the whistle and horn was going and she was blowing and blowing there at the crossing, you know, so when she gets down to Anderson near the station, you see, she blew a long whistle and horn. Yes, sir, she blowed and that make me look more so, then I kept my eyes right on her, and when I throwed my eyes to the crossing I saw this car come up and just as the car drove up on the track the train knocked it off.

Q. Now, then, before that, before the impact, did you have any occasion as you were looking in that direction to observe the wigwag signal on Howard Street?

A. No, I hadn't paid no attention before this accident.

Q. That is before the accident?

A. Yes, sir.

Q. I am asking you if at any time that you were standing there in your front yard that morning and as the train was coming up [507] to the crossing and as the car approached the crossing, did you see a wigwag?

(Testimony of Lela Johnson.)

A. I saw it then when I looked at the crossing.

Q. When you looked at the crossing, can you tell us whether or not the wigwag was in operation?

A. It was working and the bell was ringing.

Q. Did you hear the bell ringing?

A. Yes, sir, I heard the bell ringing.

Q. Did you see a light on the wigwag?

A. Yes, sir, I did.

Q. Did you see it wag back and forth?

A. Yes, I sure did.

Q. And before that, Mrs. Johnson, had you seen the lights, headlights on the locomotive approaching the crossing?

A. You mean the passenger train?

Q. Yes.

A. Yes, sir. She had her lights on.

Q. She did? A. Yes, sir.

Q. As it approached the crossing, did you have occasion to observe the beam of the headlight lighting up objects at the crossing?

A. Yes, sir.

Q. And it did do that?

A. It did do that. [508]

Q. Did it light up the car just before the impact? A. Yes, sir, it did.

Q. Now, then, did you see the headlights of any train—well, where you were when you saw the train, did it come out from behind any object? Where was the train itself when you saw it?

A. I saw the train as it passed the little bus sta-

(Testimony of Lela Johnson.)

tion there, and Mrs. Helen's cafe. I could catch the lights as it passed the cafe, and then when it passed the bus station, then I had a good view of it.

Q. As you first looked at it through that place, you could see it through.

A. Yes, see it perfectly good.

Q. Through the standing boxcar train, is that it?

A. Yes, sir.

Q. There on the siding? Now, then, after that, after it came out from behind the standing train, Mrs. Johnson, did you have a clear view of the train?

A. I had a clear view just like I am looking at you.

Q. You could see it as it continued on?

A. Yes, sir.

Q. And you turned your glass toward the crossing?

A. Yes, sir.

Q. That is when you saw the automobile at that time?

A. Yes, I saw the car.

Q. And at the same time you saw the wig-wag in operation?

A. Yes, sir, it was. [509]

Q. And had you heard the bell on the wig-wag before that?

A. Yes, sir, I had.

Q. Had you heard the bell on the wig-wag before you heard the whistle for the train or after?

A. Well, I heard the train coming down the track, then I paid attention to the bell. The wig-wag was running before the train got there and the bell was ringing.

(Testimony of Lela Johnson.)

Q. You heard the train when it was way down the track?

A. Yes, a good ways up the track.

Q. You heard the sound of the whistle for the Ferry Street crossing in Anderson?

A. Yes, for the Ferry Street crossing, before you got down to the Howard Street crossing.

Q. Did you go to the scene of the accident, or what did you do?

A. After I seen this accident, I run out across the vacant lot and I seen what had happened. I wasn't dressed and I run back to the house and got dressed and made my fire and then I went over to the accident and looked on.

Q. How long did you stay there at the scene of the accident after you were dressed?

A. About five minutes. I didn't have much time.

Q. So that after five minutes you left?

A. Yes, sir.

Q. Why did you leave? [510]

A. I had to go to work.

Q. Before the time you left, had the highway patrol officer come or not?

A. No, sir, he wasn't there when I left.

Q. There were other people around?

A. Yes, sir, there was a few people had gathered.

Q. Can you tell us what the condition was with respect to darkness or lightness? What was it?

A. Well, it was kind of, I would say, betwixt and between. It wasn't good light and it wasn't dark, wasn't good light and wasn't good dark.

(Testimony of Lela Johnson.)

Q. Practically dark except where the headlights lit it up? A. Yes.

Q. Betwixt and between, you mean with reference to dawn?

A. Yes, sir, that is what I have reference to, just about dawn.

Mr. Phelps: That is all, you may cross-examine.

Cross-Examination

By Mr. Murman:

Q. Mrs. Johnson—is it Mrs. Johnson?

A. Yes, sir; I am married. I have a family.

Q. Is your husband alive? A. Yes, sir.

Q. What is his business?

A. He and I am working at the same place.

Q. What does he do?

A. He cleans up in the bank at the Rafael Smith office. [511]

Q. How long have you and he been doing that work?

A. He been doing it four years. I started this year in February.

Q. At the time this accident happened you said you had to hurry off to work. What were you doing then?

A. I was working for Mrs. McCormack at that time, housekeeping.

Q. That is in Anderson? A. Yes, sir.

Q. Was your husband working at that time too?

A. Yes, sir, he was working in the office at that time.

(Testimony of Lela Johnson.)

Q. Does he receive a pension from anybody?

A. No, sir, not now.

Q. In 1948 was he receiving any disability pension? A. Yes.

Mr. Phelps: I object to that. I don't see the materiality.

The Court: I don't see the materiality.

Mr. Murman: I want to show an interest.

Q. (By Mr. Murman): Was the Southern Pacific Company paying him some benefits?

A. Yes, sir.

Mr. Phelps: I didn't even know it before. Of course I wouldn't have objected if there was any materiality at all. Never heard of it.

Q. (By Mr. Murman): You also had worked for the Southern Pacific Company, hadn't [512] you? A. I had a few months.

Q. Now, on this particular morning, as you stated, you were over at your home, is that correct?

A. Yes, sir.

Q. And your home is this cottage right over here where the J-1 arrow was?

A. Yes, sir, that is my cottage.

Q. That is on Douglas Street, isn't it?

A. Yes, sir.

Q. Douglas Street is the street behind Center Street, what is known as highway 99?

A. Yes, sir.

Q. It is one block further west? A. Yes.

Q. You understand what I mean? If you don't understand me, understand my questions, say so, because we want to understand each other.

(Testimony of Lela Johnson.)

A. That is right.

Q. That is beyond what this map shows, isn't that correct? A. Yes, sir.

Mr. Murman: Do you want to look at this (handing document to counsel)?

Mr. Phelps: Please. Thank you.

Q. (By Mr. Murman): Now, Mrs. Johnson, I show you what purports to be a photostat of a portion of the official map of [513] the town of Anderson, which shows the railroad tracks running across, as you see them, and you see these lines that show alternately dark and light? A. Yes, sir.

Q. Also West Center Street, you see that?

A. Yes.

Q. Then it shows Douglas Street, you see that there? A. Yes, I do.

Q. Here is Howard Street running this way and the crossing off a little bit to the side. Can you point to me on this map where your cottage was located on Douglas Street with reference to Howard Street?

Mr. Phelps: May it please the court, so that it may be clear—no objection to the use of that to refresh her recollection or point out something, but my objection would be that it is an unauthenticated photograph and without foundation, that particular document, at this time.

Mr. Murman: I think we will establish it later.

The Court: With that understanding, that you will establish that it is a real, true delineation of that, I will allow it.

(Testimony of Lela Johnson.)

Mr. Murman: Yes, I understood that I can do that, your Honor.

The Court: All right.

Q. (By Mr. Murman): Do you understand my question, Mrs. Johnson? [514]

A. Well, I don't know whether I hardly do or not.

Q. I was asking you to point out if you could on this portion of the map of Anderson where your cottage was located over here on Douglas Street, this being Howard Street along this way and Douglas Street running at right angles. Can you point that out for me?

A. Well, this is Howard Street?

Q. That is right.

A. And this is Ferry Street?

Q. That is right. A. And this is the track.

Q. That is right.

A. Then this is the depot?

Q. Here is the depot, right here (indicating).

A. My house ought to be right back in here somewhere, about here.

Q. 5? Did you say 5th? A. Yes.

Q. Here is the number—1, 2, 3, 4, 5, 6. Would it be here where it says 5?

A. It should be. I can't hardly understand that map, but it certainly seems to me like, because if this is Howard Street coming on up here——

Q. That is correct. [515]

A. It is just a block from my house to Howard. Here comes Ferry Street and this is the track?

(Testimony of Lela Johnson.)

Q. That is right. I understood you to to say you live on Douglas Street?

A. Right here (indicating).

Q. Near Howard Street?

A. Here is Douglas, this is Douglas. Yes, my house ought to be right here.

Q. Will you make a mark here?

A. It should be. I am not sure, now.

Mr. Phelps: Then I suggest it would be indefinite and uncertain. The witness is not educated and skilled in the ways of legal maps like that, and I don't think she should be asked to identify it.

The Court: Unless she is sure. Show a woman like that a map and she is not sure, doesn't understand the map, and I don't think she ought to——

Mr. Phelps: My objection is on that ground, because it has been identified on the photograph.

Mr. Murman: Of course the photograph was at an angle and this is a flat diagram of it.

Q. (By Mr. Murman: If you understand it, say so; if you don't understand it, I don't want you to mark it.

A. Well, I hardly understand this map.

Q. Then we won't use it if you don't understand it. [516]

A. I don't like to because I don't hardly understand it.

Q. All right, we won't have you mark it, then.

The Court: It is now four o'clock

Mr. Phelps: May it please the court, before the court adjourns, I wonder what your Honor's wishes are with respect to Friday of this week? I had in

(Testimony of Lela Johnson.)

mind last week we adjourned over Friday. I know the same problem exists at New Year's that existed at Christmas. I know it does for me and I think probably for the members of the jury.

The Court: I was going to be facetious, but I won't say anything.

Mr. Phelps: I had in mind, if your Honor please, if we were going tomorrow and adjourn Friday, if necessary.

The Court: Won't we be through with this case tomorrow?

Mr. Phelps: I think we will be through with the taking of testimony, certainly, tomorrow.

Mr. Murman: I will have two rebuttal witnesses that I know of.

The Court: How many more witnesses have you?

Mr. Phelps: If your Honor please, I am in a difficult position in this respect, that I had subpoena issued for one witness who has advised us that he is not able to respond to a subpoena because he is ill, and I am still endeavoring to get him down here. I don't know whether I will be able to do it or not. If I can't, of course I am in the position of [517] having to go forward without him unless it becomes necessary to ask the court for a continuance to take his deposition.

The Court: Would you ladies and gentlemen prefer to adjourn tomorrow until next week?

The Jury: No.

The Court: You would rather go forward and dispose of it?

(Testimony of Lela Johnson.)

A Juror: Get rid of it.

Mr. Phelps: That is fine with me.

Mr. Murman: That is agreeable. We will be ready to go forward with rebuttal tomorrow.

The Court: Will you be able to start your arguments tomorrow?

Mr. Murman: I think so. I don't see any reason why we can't.

The Court: I would like to have you all argue on one day, if you can.

Mr. Phelps: I would think so. In fact, that is very important.

The Court: Then I will instruct the jury at 9:30 Friday morning.

Mr. Murman: Yes, your Honor. I think that is about it.

The Court: Then we will adjourn until tomorrow morning at 10 o'clock, and bear in mind the admonition heretofore given you.

(Thereupon an adjournment was taken to Thursday, December 29, 1949, at 10:00 a.m.)

* * *

December 29, 1949, 10:00 o'Clock

The Clerk: Shanahan v. the Southern Pacific, for trial.

Mr. Phelps: Ready, Your Honor.

Mr. Murman: Ready. Mrs. Johnson, I believe, was on the witness stand, Your Honor.

The Court: Yes, take the stand.

(Testimony of Lela Johnson.)

LELA JOHNSON

resumed the stand on behalf of the defendant.

Cross-Examination

(Continued)

By Mr. Murman:

Q. Mrs. Johnson, on the morning of December 27, 1948, you were in your home, I think you said?

A. Yes, sir.

Q. That is over on Douglas Street?

A. Yes, sir.

Q. And about what time had you gotten up that morning, do you remember?

A. Well, it was around about a quarter to six that morning.

Q. A quarter of six. It was dark at the time, was it? A. Yes.

Q. What did you do after you got up? Did you go outside at all or did you stay in the house?

A. After I gotten up, I started me a little fire, and then I had to have some more kindling and I went outside to get me [519] some wood and kindling.

Q. Where do you keep your wood and kindling?

A. Outside at my gate.

Q. The front gate? A. Yes, sir.

Q. That would be on Douglas Street?

A. Yes, sir.

Q. That was after you had had a fire made inside, is that it? A. Yes, sir.

(Testimony of Lela Johnson.)

Q. Did you go out alone or did you go with somebody else? A. I was alone.

Q. Alone. When did you hear the train?

A. Well, after I started out I heard the train coming.

Q. What did you hear about the train?

A. I just heard the rumbling of the train and I heard the whistle way up the track, seemed to me like it might be about a mile up the track.

Q. Was it a whistle you heard, a steam whistle?

A. I heard a horn and the whistle.

Q. You heard a horn and whistle?

A. Yes, sir.

Q. When you say horn, what do you mean by that?

A. Well, the steam whistle it blows and the horn goes something like this: Ahhhh-ahhhh-ahhhh.

Q. You mean the horn on the train? [520]

A. Yes, sir. I called it a horn. I don't know.

Q. There is a difference in sound between what you call a horn and what you call a whistle?

A. Yes, sir.

Q. And you said you heard both the whistle and the horn? A. Yes, sir.

Q. You went out to the kindling pile, did you?

A. Yes, sir, I went outside of my gate. My wood yard is outside of my gate. I went outside of my gate to get me some wood and kindling to finish my fire, and after the train was approaching, I stayed and watched to look to see it go by as I usually do.

Q. I understand that you looked towards the

(Testimony of Lela Johnson.)

east, didn't you? That is, it would be toward the train tracks? A. Yes, sir.

Q. From Douglas Street?

A. From Douglas Street.

Q. There were some buildings in front of you, weren't there? A. Yes, sir, there was.

Q. In other words, your view of the train is not a clear view all the way, is it?

A. No sir, it isn't, not all the way.

Q. When you looked over there, was it still dark?

A. It was kind of dark.

Q. How about the weather? Did you notice what kind of weather [521] it was that morning?

A. It was cloudy, but high cloudy. It wasn't low clouds. The cloudiness was high and the weather, it wasn't foggy, either.

Q. Would you say it was not misty?

A. Well, I didn't pay that attention. Might have been a little misty. I didn't pay any mind.

Q. You didn't see any mist?

A. No, I didn't see any, but I know there was high cloudiness.

Q. As you looked over the railroad tracks, did you see a train on the track there, standing on the track?

A. No, sir, I didn't see any train standing over there.

Q. You didn't see a freight train?

A. No, I didn't pay any attention.

Q. Could you see the lights at the depot?

A. Yes, sir, I could.

(Testimony of Lela Johnson.)

Q. You didn't see the caboose silhouetted against those lights?

A. No, sir, I didn't see it.

Q. Where did you first see the light on the engine you mentioned on the train that you heard?

A. Well, when that train, when this passenger train was approaching the depot, I could look and see the light down the—flashing down the track, then as she passed by Miss Helen's Cafe I could catch a glimpse of the train, and then it passed the bus station right before my door, and I was standing right before [522] my door in my wood yard, and as she passed, of course she had the horn and whistle on, and as she passed, of course she throwed her light as she come, you know, and I kept looking and just——

Q. Well, let we ask you this first before we get that far. A. Yes.

Q. As you saw the light on the engine for the first time, couldn't you see the freight train silhouetted against the engine light?

A. No, I didn't pay any attention. I didn't see no freight train. I didn't even know there was one over there.

Q. Do you remember seeing a line of sort of black objects up until the depot came into position?

A. I didn't see any that night. I might have seen it, but I don't remember.

Q. You don't remember seeing it?

A. No, sir.

(Testimony of Lela Johnson.)

Q. You have told us about the various places that the buildings got in your way. Did you mention Helen's Cafe? Is that one building?

A. Yes, sir, that is one of the buildings. [523]

Q. I am showing you now this panorama view of defendant's exhibit L. A. Yes, sir.

Q. You mentioned that building, Helen's Cafe?

A. That is it.

Q. And you said something about the Greyhound bus station. Where is that?

A. It is right in here (indicating). Before my door. This is Miss Helen's cafe, then right on down is the little old bus station.

Q. Is that further to the north than Helen's Cafe?

A. No, sir, Miss Helen's Cafe is further to the north. What is these signs in here?

Q. I don't know. They are in the picture. They are apparently on the corner of Center Street and Howard Street there.

A. It shows Miss Helen's Cafe. The bus station should be right in here.

Q. But you did see the form of the bus station and the form of the cafe, is that right?

A. Yes, sir.

Q. The train came along? A. Yes.

Q. You were watching the train, were you?

A. Yes, sir, I was.

Q. How about this building on the corner here where that Coca-Cola [524] sign is at that corner?

(Testimony of Lela Johnson.)

As the train went along could you see it come by the sign here?

A. That is that—this is Helen's Cafe——

Q. How about this building right here where the Cola sign and Miss Helen's Cafe, and I could catch on?

A. Yes.

Q. Did that get in your way at all?

A. Yes. A little up it passed between that Coca-Cola sign and Miss Helen's Cafe, and could catch glimpses of the train as she went by.

Q. You caught glimpses of the headlights as it came between the buildings?

A. That is right.

Q. You were watching the headlights all the time?

A. Yes, I kept my eyes right on it.

Q. Right on the headlights? Was it going pretty fast?

A. Pretty fast, to me.

Q. How about the trees way up here? Did you see those trees as the headlights were going along? There seem to be a number of trees in the background here.

A. Yes, sir, sure I could see the trees in over there.

Q. At that time, of course, there were no leaves on the trees?

A. No.

Q. Except on the evergreens, apparently. As the train came out behind this last building on the corner, you then could [525] see it up Howard Street, is that right?

A. Yes, sir, a clear view.

Q. Were you still watching the headlights?

A. Yes, I was still watching the headlights.

(Testimony of Lela Johnson.)

Q. You kept looking at the headlights as it went down the track?

A. Yes, sir, I kept my eyes right on the train.

Q. Right on the train. A. Yes.

Q. I notice there appears to be a palm tree right over here. Is that a palm tree, Mrs. Johnson?

A. Yes, sir. That is set in a vacant lot.

Q. Was that between you and the railroad track?

A. No, sir, it is just opposite me.

Q. It is opposite you?

A. Yes, sir, right across the fence from me over there.

Q. That palm tree, then, is on Douglas Street?

A. Yes, sir, it is on Douglas Street, on the same side I am on.

Q. How about this tree right up here near to this, looks like a box. Is that up on the right of way?

A. Yes.

Q. I am pointing to this tree. That is up near to the box? A. Yes.

Q. Then this telegraph pole and this other telegraph pole. As the train came to the crossing you were still watching the lights of the train, I [526] presumed?

A. Yes, I was watching the whole train.

Q. Yes. You were watching the whole train? I think you said you always watched the trains going south?

A. I do because I think about my mother down there.

(Testimony of Lela Johnson.)

Q. When it got to the crossing what did you see?

A. I saw a car coming up on the crossing.

Q. You saw the car? A. Yes, sir.

Q. You are sure you saw the car?

A. Yes, sir, I saw the car before the train hit it.

Q. It was still dark, was it not?

A. It was still dark, yes, but the car lights were burning and the train lights.

Q. The car lights were burning?

A. Yes, and the headlights of the train was on. They throwed plenty of light so I could see. Anybody could.

Q. So you actually saw the car?

A. Yes, sir, I saw the car.

Q. It was a pretty short interval, wasn't it?

A. Yes, it was just a minute I saw it up until the train hit it.

Q. Much less than a minute, wasn't it?

A. Oh, yes, sir.

Q. You mean much shorter than that?

A. Yes, sir. [527]

Q. You saw the train hit the car and there was a big flash? A. Yes, just a blaze.

Q. As you were watching the train going down the track and the headlights, what is the next thing you saw? The headlights of the automobile?

A. Before the train hit it?

Q. Yes. A. Yes, sir.

Q. You were watching the train going down there? A. Yes, sir.

(Testimony of Lela Johnson.)

Q. And the next thing you saw, was that the headlights of the automobile?

A. Yes, I just throwed my eyes to the car as this car come up on the crossing, and the lights were burning on the car.

Q. Then what did you see after that?

A. The train struck it.

Q. Did you see the train strike it?

A. Nothing but that flash.

Q. A big flash? Did you hear the noise when the train hit it?

A. Yes, sir, I could hear it.

Q. Then the train went on past the crossing?

A. Yes.

Q. I think you said you went in and got dressed and came——

A. No, I didn't at that time. I run on across the way.

Q. You went all the way up Douglas Street?

A. Over to the crossing [528] with my housecoat on, then I looked and seen what had happened, then I rushed away before somebody gets there and I went back to the house and got dressed and finished making my fire. I had never went back to finish my fire. I finished my fire and got dressed and went up over there and at that time there was a young man and lady had drove up, and I was talking to them and the brakeman and the conductor had got off and come back.

Q. Do you remember a gentleman by the name of Mr. Wickfield talking to you about the accident on December 31 at your home?

(Testimony of Lela Johnson.)

A. Yes, sir, I remember him.

Q. That is the gentleman here in the court room?

A. Yes, sir, I remember him.

Q. Do you remember telling him at that time you didn't hear any train whistle blow?

Mr. Phelps: If your Honor please, if this is a written statement I suggest the witness is entitled to see it and so am I.

Mr. Murman: I am asking if she didn't make an oral statement.

Mr. Phelps: I would like to inquire whether you do have that? If that is what you want to do, I think you should proceed in that way. That is the orderly way.

Mr. Murman: It is an oral statement I am inquiring about now. [529]

The Court: I will overrule the objection. Do you understand the question or would you like to have it repeated to you?

A. Well, I wouldn't mind. You can repeat that question again, if you will.

Q. (By Mr. Murman): I will be glad to. Do you remember talking to Mr. Wickfield? He was asking you about what you saw and heard that morning.

A. Yes, sir, I remember him talking to me.

Q. Do you remember telling him you didn't hear the whistle blow?

A. I remember telling him I heard a horn and whistle blow.

(Testimony of Lela Johnson.)

Q. You said the horn and whistle? A. Yes.

Q. You don't remember telling him you didn't hear a horn or whistle blow?

A. No, sir, I don't remember telling him.

Q. And do you remember telling him at that time that when you saw the automobile there was no headlight on the car?

A. No, sir, I don't remember telling him that, either.

Q. Do you remember after he talked with you that he asked you to sign something? That is, after you talked with him.

A. Yes, sir, he asked me to sign a paper, I believe, or something.

Q. Did you read the paper over before you signed it?

A. No, sir, he read it for me. [530]

Q. He read it for you? A. Yes, sir.

Q. You didn't have your glasses with you at that time?

A. No, sir, I didn't have them and he read it.

Q. That was at your home?

A. At my home.

Q. You only know what he said to you about the paper and then you signed, is that right?

A. Yes, sir.

Q. That is your recollection now?

A. Yes, sir.

Q. You say you didn't read the paper over?

A. No, sir, I didn't read the paper. He read it for me.

(Testimony of Lela Johnson.)

Q. He read it for you? Are you sure about that?

A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions, your Honor.

May this witness be excused.

Mr. Murman: Yes, she may be excused.

The Court: All right, you may step down.

(Witness excused.)

Mr. Phelps: Before we proceed further, if your Honor please, may I take up a matter with the court and counsel in the absence of the jury?

The Court: Will it take very long? [531]

Mr. Phelps: It will take only a few minutes. In fact, if we can step into chambers it probably wouldn't take thirty seconds.

The Court: All right, remain in the box, ladies and gentlemen, and we will go out this time.

(The following proceedings were had in court chambers in the absence of the jury.) [531-A]

(The following proceedings were had in the Judge's chambers outside of the hearing of the jury:)

The Court: At the request of Mr. Phelps, counsel for plaintiff and defendant retired to chambers with the Judge, and the following ensues:

Mr. Phelps: I didn't want to take up in the

presence of the jury without first advising Mr. Murman. I want to ask Mr. Murman whether or not it will be necessary, whether he wants me to call as a witness to prove that this Mr. Johnson, the rear brakeman of the train that was on the siding, is no longer in service. I attempted to find him. They checked all of his own addresses; we have been unsuccessful in that. I had this in mind, and I didn't want it to come up before the jury,——

Mr. Murman: I will make no point of it.

Mr. Phelps: I want to get that before the jury as a stipulation, and the point is this, they be fully advised,——

Mr. Murman: Yes.

Mr. Phelps: He left the service on December 31, 1948. Mr. Turner, who is sitting beside me, a member of the claims department of the Southern Pacific, at my request has made repeated efforts to try to locate him and has been unsuccessful and he can be called to testify to those facts, which I had in mind. It just occurred to me he has been sitting throughout the proceedings, and the other witnesses have been excluded.

Mr. Murman: I make no issue on that. Your own conductor [532] said he didn't see him after that particular occasion.

Mr. Phelps: Can I make that statement?

Mr. Murman: Yes, you can make that statement that you haven't been able to locate him. If that is the fact and if you say those are the facts, then those are the facts.

The Court: How do you stand now?

Mr. Phelps: I stand in this way: I am now ready to rest, and this is the other thing I want to take up. Now, I have tried, and have a subpoena out for another witness, a witness who has said that he is unable to come. He is an independent witness. All he would testify to is that he heard the whistle, nothing more, and that it whistled repeatedly as the train came into town. Now, I am in the position I don't want to ask for any continuance to take a deposition. I wondered what your thinking was along the line, if he is called, that you would stipulate that he would testify that he did hear the whistle on repeated occasions as the train——

Mr. Murman: Well, I can't stipulate.

Mr. Phelps: If you won't stipulate to that,——

Mr. Murman: My witnesses have told me and my understanding of the case is that the train whistle did not blow until it got to the Howard Street crossing. I will do this: I am perfectly willing, if you can get your witness at any time before the arguments, that you may put him on if he comes after my rebuttal; I have no objection. [533]

Mr. Phelps: I am satisfied I can't do that, Syd. The only way I can get him down—he is a reluctant witness at best——

Mr. Murman: He is up at Anderson?

Mr. Phelps: Yes, and I would have to get a bench warrant; he has been served, and I don't want to do that, so if that is your position, I think then there is nothing I can do but take the practical

way out of just forgetting it now. I don't like to do that.

Mr. Murman: I am sorry. If there was some indication—I am afraid Mrs. Shanahan wouldn't like me to stipulate to that.

Mr. Phelps: Then I shan't mention that further in front of the jury.

Mr. Murman: I think you have got plenty of evidence about the whistling.

The Court: How many witnesses have you now?

Mr. Murman: I have three witnesses, two of whom will be very short, and one who will be a little longer. We should finish by noontime on the testimony, maybe before. If so, I will be glad to start my opening statement——

The Court: You gentlemen want to come in here then under the rule and be advised about what instructions I will give you?

Mr. Phelps: Yes, that is important in this case.

The Court: I am sorry that I am not giving all the plaintiff's exceptions, but I am modifying a couple. I am [534] making it very short, giving very nearly all the defendant's instructions except those which are here. I can hand them to you, and many of these are covered by my general instructions, see, and some of these I didn't feel like giving because they were more instructions on the fact than I think I should have given.

Mr. Murman: I noticed in my copy there are a group of some 65 to 75 missing. Was that a mis-numbering?

Mr. Phelps: Well, that was done——

Mr. Murman: I didn't mean to interrupt you, Judge.

Mr. Phelps: There were no exceptions in those intervening numbers, Mr. Murman.

The Court: Instruction No. 3 of your (indicating Mr. Murman), I am modifying two or three of what you charged and what the defendant charged.

Mr. Murman: Yes, I understand.

The Court: Now, the instruction you gave me, No. 16, is omitted to say, provided the defendant—provided the alleged negligence of the defendant was the proximate cause of the accident, also that the plaintiff—plaintiff's husband was free of fault. So I added that to that.

Mr. Murman: I can see your point and I guess what I had in mind, the other instructions.

The Court: A couple of yours I modified in certain respects here, but these are the ones I didn't give, but I [535] think you find in both instances—for instance, on this minor discrepancy here (indicating), and I gave a general instruction that practically covered it, and some of these others here I thought were more on the facts than would permit me to give, so you can——

Mr. Phelps: Yes.

Mr. Murman: Another thing, you want to renew your motion now so the Court——

Mr. Phelps: This moment?

Mr. Murman: It is too early?

(Whereupon the Court and counsel returned to the courtroom, and the following proceedings were had in the presence of the jury.)

Mr. Phelps: Pursuant to the instructions—discussions we have had in chambers and according to the stipulation agreed to by and between the parties, I want to state to the court the formal statement which I ask Mr. Murman to accept if it correctly states it as I understand it, he is willing to stipulate that Mr. Johnson, who is the man who has been described as the rear brakeman of the freight train which was in on the siding at the time of the accident at Anderson, and who has testified — who has been identified by Mr. Griffith, the conductor, as having been with him at the time Mr. Griffith observed the accident, that Mr. Johnson, the rear brakeman left the service of the Southern Pacific Company on December 31, 1948; that his present whereabouts are not known to me or anyone having any connection with the defense of this case; that on my request his personnel record was checked, all addresses and references which he made in his application to go to work were checked, and efforts were made to locate him at those addresses. They were unsuccessful and we were unable to find him in time for this trial.

Mr. Murman: So stipulated.

Mr. Phelps: With that stipulation, then, if your Honor please, the defense rests.

Mr. Murman: Plaintiff will call Mr. Whitfield to the stand. [537]

WILBERT G. WHITFIELD

called as a witness on behalf of the plaintiff, in rebuttal, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Wilbert G. Whitfield.

Direct Examination

By Mr. Murman:

Q. What is your business, Mr. Whitfield?

A. Criminal investigator with the Internal Revenue Service.

Q. The deceased in this case was connected with the Internal Revenue Service, is that correct?

A. That is right.

Q. Because of that fact you were delegated to go up and investigate the facts, were you?

A. I was.

Q. You went to Anderson, did you?

A. I did.

Q. And in accordance with your duties you made an investigation? A. I did.

Q. Now, among other things, did you talk to Mrs. Lela Johnson? A. I did.

Q. Where did you talk with her?

A. At her home in Anderson, on Douglas Street.

Q. Do you have any idea how far that building that she lives in was removed from the Howard Street crossing? [538]

A. It is about 500 feet.

Q. 500 feet. And when did you talk with her?

(Testimony of Wilbert G. Whitfield.)

A. I talked with her on December 31, 1948.

Q. At her home? A. At her home.

Q. Was there anyone else present?

A. Her husband, Carey Johnson.

Q. Now, did you ask her about her observations on the morning of the accident? A. I did.

Mr. Phelps: I will object, then, if your Honor please, as not proper impeachment, no proper foundation. It is now established another person was also present. Mrs. Johnson has never been asked about a conversation, no impeachment in the conversation in which another person was present other than Mr. Whitfield; without foundation.

Q. (By Mr. Murman): Just to remove any doubt, did you have more than one conversation with her?

A. I had just one conversation.

Q. Just one conversation, so that what you are referring to is the only conversation you had with Mrs. Johnson? A. That's right.

Mr. Murman: I think that removes——

The Court: I think so.

Mr. Phelps: Exception. [539]

The Court: I don't think the conversation should be given, simply the statements that you claim them to impeach her.

Mr. Murman: That is my intention.

The Witness: May I correct that? Carey Johnson was not at all times present during the statement. He came in during, that is during the con-

(Testimony of Wilbert G. Whitfield.)

versation he came in, during the last part at the time which I read the statement to Mrs. Johnson, and was a witness to her signature.

Q. (By Mr. Murman): So he was there during the latter part of the conversation?

A. That's right.

Q. But there was only one occasion when you talked with her? A. That's right.

Q. Now, did you ask her about what she heard in connection with the train? A. I did.

Q. What did she say, if anything, about a whistle?

Mr. Phelps: I object to that as not the proper way to impeach, if your Honor please, what she said, that could lead to anything. The only way is to ask an exact question.

Q. (By Mr. Murman): At that time or place, Mr. Whitfield, did she make the statement to you that "I did not at any time hear the train whistle blow?"

A. Yes, she did. I questioned her carefully on that point. [540]

Q. Now, did she also make the statement to you that there was no headlight on the car?

A. She did.

Mr. Murman: I have no further questions.

Cross-Examination

By Mr. Phelps:

Q. Mr. Whitfield, you say you are employed by

(Testimony of Wilbert G. Whitfield.)
the Criminal Division of the Department of Internal Revenue?

A. I am a criminal investigator with the Internal Revenue Service, Treasury Department.

Q. You made an investigation of this accident, did you not? A. Yes, I did.

Q. And in the course of that investigation you took statements from various parties and submitted various reports? A. I have.

Q. Now—— A. One report, yes.

Q. To whom was that report submitted?

Mr. Murman: I object to that as incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

The Court: I will allow it.

Q. (By Mr. Murman): To whom was that report submitted? A. To my superior officer.

Q. And who is that?

A. F. L. Myers, investigator in charge.

Q. That was to go on to the Federal Compensation Commission, [541] isn't that correct?

Mr. Murman: If the court please, counsel should know, if he doesn't know, that the Compensation Commission has no connection with the Treasury Department, merely for the purpose of getting before the jury that which has no bearing on this. Object on that ground, not within the direct examination, it is way beyond direct examination, does not go to the issues of this case.

Mr. Phelps: I submit——

(Testimony of Wilbert G. Whitfield.)

The Court: I think it may indicate interest——

Mr. Phelps: I am trying to find exactly that, the interest.

The Court: I will allow it.

Q. (By Mr. Phelps): For this investigation, isn't that correct?

A. Where it routes from my superior officer, I have no knowledge, except that I believe our Legal Division gets a copy of it and they make all the recommendations from there on. Who else gets copies, I have no idea. I have nothing to do with the distribution of the report.

Q. You don't know anything further than what you just said? A. No, sir, that's right.

Q. Now, Mr. Whitfield, you made some notes of that conversation, did you?

A. Surely. [542]

Q. Do you have that, may I see it?

A. My notes of the conversation?

Q. Yes. A. Yes, I have a statement.

Q. May I see it?

Mr. Murman (To the witness): Do you have it with you? You'd better get it, I don't have it.

(Witness leaves stand to look for paper.)

Q. (By Mr. Phelps): You have a typed copy of this?

Mr. Murman: I don't know that I have anything more than a summary of it.

Mr. Phelps: Oh. Will your Honor excuse me and the jury for just a moment?

Mr. Murman: If counsel wishes to put in evi-

(Testimony of Wilbert G. Whitfield.)

dence based on the information, what I have here—what I have here is apparently a summary—I have no objection, provided it is properly identified.

Mr. Phelps: I would like to be heard on that. May we approach the bench, if your Honor please?

The Court: Yes.

(Counsel and court confer at the bench out of hearing of jury and reporter.)

Mr. Phelps: Mr. Whitfield, I will ask you if Mrs. Johnson on the occasion which you have already testified to, which you have said on your direct examination about the referring to [543] the whistle—— A. That's right.

Q. I will ask you if she did not say to you that she heard the heavy horn of the southbound passenger train in the distance and she looked east to see it going by, the horn was honking and the bell was ringing, but that she did not at any time hear the train whistles, isn't that a fact; isn't that what——

A. She did not at any time hear the whistle blow. That is what she told me. The heavy horn, she called it, but, "I did not hear the whistle blow." She was positive of that.

Q. Did she substantially say it the way I have summarized it to you just now?

The Court: Read it to him again.

Q. Did she tell you that she heard the heavy horn of the southbound passenger train in the dis-

(Testimony of Wilbert G. Whitfield.)

tance, that she looked straight east to see it going by, that the horn was honking and the bell was ringing, but she did not at any time hear the train whistle? A. That is what she said.

Q. Yes.

Mr. Phelps: I have no further questions.

Mr. Murman: No further questions.

(Witness excused.)

Mr. Murman: Call Mr. Tolson. [544]

WAYNE LeROY TOLSON

called as a witness on behalf of the plaintiff, in rebuttal, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Wayne LeRoy Tolson.

Direct Examination

By Mr. Murman:

Q. Mr. Tolson, you are appearing here pursuant to a subpoena, are you? A. Yes, sir.

Q. Where do you live?

A. At Cottonwood, California.

Q. Is Cottonwood near Anderson?

A. Yes, sir.

Q. Do you live in Cottonwood or out somewhere?

A. Just outside of Cottonwood, about seven miles west of Cottonwood.

Q. On a ranch? A. On a ranch.

(Testimony of Wayne LeRoy Tolson.)

Q. A year ago did you live near Anderson?

A. I did.

Q. Were you living in the town?

A. No, about a mile and a half north of Anderson on the river.

Q. You had a little acreage up there, did you?

A. I did.

Q. What is your business, Mr. Tolson?

A. At present I am pulling lumber at the Smith Lumber Mill about a mile and a half south of Anderson.

Q. Where were you working a year ago?

A. No.

Q. Where were working a year ago?

A. I was working at the High Tower Service Station and Feed Store.

Q. Where is that?

A. Directly in Anderson.

Q. With respect to the railroad tracks, where was it located?

A. Directly across from the Howard Street crossing.

Q. How long had you been working there?

A. Oh, about two years. I think I went to work there about September, two years apart.

Q. I show you defendant's exhibits E, G, H, I and O, which purport to be pictures showing you the location you have just referred to, and ask you to look at those pictures and state whether or not they show the service station you mentioned?

A. They do, sir.

(Testimony of Wayne LeRoy Tolson.)

Q. And does that service station also appear on the lefthand side of this panorama photo, which is defendant's exhibit L? A. That is right.

Q. Apparently it is more than just a service station there. [546] Were there any other parts of that establishment in which you were working?

A. Yes, sir, a ice house, feed store and lubrication room.

Q. Those are all marked right on there?

A. That is right; this is the feed store and the lubrication room and the service station.

Q. Pointing to defendant's exhibit L, in evidence. Were you there on the morning of December 27, 1948? A. I was, sir.

Q. You remember that morning, do you?

A. Pretty well in mind.

Q. About what time did you come to work there that morning?

A. I would say 7:00 o'clock.

Q. And what was the nature of the weather that morning?

A. It was really dark and misty.

Q. What did you do after you got there at 7:00 o'clock.

Mr. Phelps: I am going to object to this. It may be preliminary, and if it is, I submit it, of course, but I haven't seen yet where this leads to any rebuttal.

Mr. Murman: Well, it will. It is all preliminary, your Honor. We have to get the picture, first.

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: Yes, well——

Mr. Murman: I can assure you it is rebuttal.

Mr. Phelps: All right.

Q. (By Mr. Murman): What did you do after you got there at [547] 7:00 o'clock?

A. My first duty is to open up the store, unlock the ice room and feed store and get the — from them I usually got the air hoses out and water hoses, connected them up, and then I usually went into the rest rooms and—they are in back of the service station—and cleaned those up, because those are left open for the public use. It's the only service station or rest rooms in town you could use. They were left open. I usually went back and cleaned those and then I was ready for business.

Q. Then you were ready for business?

A. Yes, sir.

Q. Did you stay on the premises that morning?

A. I did.

Q. Do you remember an accident occurring there that morning? A. I did.

Q. By the way, how far is the service station from the Howard Street crossing?

A. I would estimate between, oh, 80 to 100 feet across the highway.

Q. Did you know there was a signal of some kind at the Howard Street crossing? A. Yes.

Q. What kind? A. A wig-wag. [548]

Q. What kind? A. Wig-wag.

Q. Just before the collision occurred, what were you doing?

(Testimony of Wayne LeRoy Tolson.)

A. Just before the collision occurred I was servicing a pickup with a small amount——

Q. What is a pickup?

A. Well, a car, an automobile.

Q. An automobile?

A. I was giving—filling it with gas. I think he ordered five gallons of gas, if I remember rightly.

Q. You were actually putting gas in the tank?

A. I was putting gas in the tank.

Q. You were watching the tank, then?

A. I was watching the meter or the pump because I was just about through at the time.

Q. Did you hear the collision occur?

A. I did.

Q. Prior to hearing the collision occur, did you hear anything in the nature of a crossing bell?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. If that is to be brought out, it is to be brought out in the case in chief.

Mr. Murman: It is rebuttal of at least two witnesses who testified that the bell was ringing, Mrs. Johnson and Mr. Griffith. [549]

Mr. Phelps: That was part of your case.

Mr. Murman: No, Mrs. Johnson and Mr. Griffith testified it was ringing.

The Court: The point is, isn't it part of your case? They were just rebutting your case when they testified to that. However, I will allow it.

Q. (By Mr. Murman): Do you know what the question was? A. Repeat it, please.

(Testimony of Wayne LeRoy Tolson.)

Q. Just prior to the collision did you hear the signal bell ringing?

A. I don't recall it, no.

Q. Now, you had been there prior to the collision for some time? You said two years?

A. Two years.

Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has no bearing on the case. It is too late at this time.

Mr. Murman: You Honor will recall Mr. Rowe, the signal [550] man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps: That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

(Testimony of Wayne LeRoy Tolson.)

The Court: I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.

Mr. Murman: Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court: What is the time? How remote is this?

Mr. Murman: Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court: That is a collateral matter.

Mr. Phelps: It is a collateral matter. [551]

Mr. Murman: No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman: We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: May it please the court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court: It deals with something four months before.

Mr. Murman: I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court: The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman: Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps: Then I enlarge on the objection, if your [552] Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman: Yes, it would impeach him.

Mr. Phelps: It is still a collateral matter.

Mr. Murman: He said on every occasion he tested that, on every working day, and every occasion it was working properly, and counsel made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the

(Testimony of Wayne LeRoy Tolson.)

signal not being one that could be relied on, we haven't established negligence. He produces a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps: Purely collateral issue.

Mr. Murman: It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps: If the court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late. [553]

The Court: I think I will sustain the objection.

Mr. Murman: Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman: Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps: Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court: It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I will allow the

(Testimony of Wayne LeRoy Tolson.)

question if it is directed to a point that is within a reasonable time.

Mr. Murman: All right.

The Court: A day or so before or afterwards, maybe even a week.

Mr. Murman: All right, I will ask that question.

Q. Mr. Tolson, how long——

Mr. Phelps: I want to enlarge on the objection, that it is leading and suggestive.

The Court: Yes, but I will allow it.

Mr. Murman: Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position? [554]

Mr. Phelps: Same objection, your Honor understands, runs to this line of questioning?

The Court: Yes.

Mr. Phelps: It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, it was within, oh, 30 days, anyway. I have seen him when he was testing, it would hold in that position where it wasn't centered.

Mr. Phelps: I will ask that go out as too remote.

Q. (By Mr. Murman): When did the signal get that way?

A. When he was testing it.

Q. You said within 30 days of the accident?

A. I would say something like that. I don't

(Testimony of Wayne LeRoy Tolson.)

remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps: May I please——

The Court: How long before the 27th day of December was this? [555]

A. Well, directly, a direct day I couldn't answer that only just by saying it was within 30 days, sir, or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps: Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman: I submit it is rebuttal.

Mr. Phelps: It is not rebuttal.

The Court: I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman: Well, I beg to differ with your Honor, and under the circumstances I have no further questions.

Cross-Examination

By Mr. Phelps:

Q. Now then, Mr. Tolson, you were asked——

(Testimony of Wayne LeRoy Tolson.)

Mr. Phelps: Your Honor please, I don't want to be wrong in this, but my recollection is that your Honor did permit this witness to testify as to whether or not he heard the bell at the time of the accident.

The Court: That is right.

Mr. Phelps: Over my objection.

Q. Now, then, Mr. Tolson, directing your attention entirely to the day, that one occasion that you have testified to, I will ask you whether it is not a fact that you do not recall [556] noticing whether the wig-wag was operating or hearing the bell—if it isn't the fact that you are so accustomed to hearing the signal in operation that you paid no attention to it, and isn't that a fact?

Mr. Murman: That is objected to as compound, complex, and calling for a series of answers. I suggest counsel reframe it.

Mr. Phelps: All right. Let's take them one at a time. I will reframe the question.

Q. I will ask you again, directing your attention to that one occasion, if it isn't a fact that you don't recall noticing whether the wig-wag signal was operating? A. I don't recall.

Q. That is the fact, is it not? Or that you do not now recall hearing the bell, that is the fact, isn't it? A. That is the fact.

Q. It is also the fact, is it not, that you are so accustomed to hearing the signal in operation that you paid no attention at all on that occasion?

(Testimony of Wayne LeRoy Tolson.)

A. At that station, I was occupied at the time being.

Q. Yes, and as a matter of fact you do not know whether the signal was operating prior to the accident or at the time of the accident?

A. What do you mean by prior to the accident?

Q. Prior to this. [557]

A. Just a few minutes before?

Q. Just before the accident, yes.

A. No, I don't.

Q. You don't know one way or the other, isn't that the fact, Mr. Tolson? A. That is right.

Q. And you weren't paying any attention whether it was working or whether it wasn't?

A. I was occupied and I didn't pay particular attention, that is right.

Q. And it is true that one of the reasons you didn't pay any attention was that you are so used to hearing it that you don't pay any attention?

A. I am accustomed to that noise, yes.

Mr. Phelps: No other questions.

Redirect Examination

By Mr. Murman:

Q. Did you give a statement to somebody from the Southern Pacific Company as to your recollection? A. I did.

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial.

Mr. Murman: All right, no further questions.

The Court: That is all.

(Witness excused.)

Mr. Murman: Call Mrs. Shanahan, please. [558]

NELDA SHANAHAN

recalled on her own behalf, in rebuttal, previously sworn.

Direct Examination

By Mr. Murman:

Q. Mrs. Shanahan, there has been some suggestion here that this car that was wrecked was your husband's car. What is the fact about that?

A. It was in my name.

Q. Who purchased it?

A. I purchased it before we were married and was paying for it on contract and the payments were completed after we was married.

Q. It was in your name, is that correct?

A. Yes.

Q. After the accident did you dispose of it?

A. I did.

Q. As junk? A. Yes, sir.

Mr. Murman: No further questions.

Mr. Phelps: I have no questions, your Honor.

(Witness excused.)

Mr. Murman: Plaintiff rests.

Mr. Phelps: Then, if your Honor please, there is a matter we can take up in the absence of the jury. However, I see it is 11:00 o'clock.

The Court: Yes, we will take a recess as far as the jury [559] is concerned for ten minutes. During

the recess, will you bear in mind the admonition I have heretofore given you. Will you take the jury out?

(Thereupon the jury left the court room and the following proceedings were had outside the presence of the jury.)

Mr. Phelps: I will endeavor to be as brief as I can.

At this time on behalf of the defendant, Southern Pacific Company, I move for a directed verdict, that is, that a verdict be directed in favor of the defendant, Southern Pacific Company, on all the grounds heretofore stated and as enlarged upon in the argument on motion for non-suit. Specifically, I would like to direct your Honor's attention to the—and ask that the motions be deemed to be made separately and severally as to each of the charges of negligence, namely, first the charge of negligence in the maintenance and operation of the crossing signal and warning device, and then separately and severally, in the event that that motion be denied, reserving the right of course that it also be deemed to be made as I have directed verdict on the second ground or second charge of negligence, of the negligent operation of the train.

I would like to state also, if your Honor please, that the grounds are that as a matter of law there appears no negligence on the part of the defendant, Southern Pacific Company, in the maintenance and operation of the crossing signal and warning device; that there is no negligence in the [560] opera-

tion of the train, as a matter of law; that there is no act or omission on the part of any officer, agent, servant or employee of the defendant, Southern Pacific Company, that proximately contributed to the accident here; and, further, on the ground that the deceased's own conduct contributed proximately to the accident, as a matter of law, so as to cause the accident and to bar this action; and enlarging upon these grounds by stating that in all ways stated on the argument on motion for non-suit.

I can anticipate your Honor's ruling. May I have a ruling, because I have another alternative motion to make.

The Court: I will at this time deny the motion.

Mr. Phelps: Yes. Then, if your Honor please, that motion having been denied, I would like to move separately, as I know of no procedure, no other procedure, to raise this point; that the court withdraw from the jury the issue, first, of the charge of negligently maintaining the crossing signal and warning device, both as to the maintenance and as to the operation, on the ground that there is no evidence, not one scintilla of evidence, that there was negligence in the maintenance of the crossing signal or warning device, and there is no evidence of any negligence in the operation of this crossing signal or warning device; and separately and severally, of course, that the issues of the negligence in operation of the train lights be withdrawn from the jury in the event the [561] other is denied, or, alternately, if the first is denied that the second

be withdrawn, and if the second is denied that the first be withdrawn.

The Court: I will deny both of them.

Mr. Phelps: Very well.

The Court: We will take a recess for five minutes, then you will proceed with your argument?

Mr. Phelps: What is the court's pleasure as to the time?

The Court: I would like to have you at noon time look over that so that you will be ready quickly with your objections.

Mr. Phelps: I can do that very quickly. I have in mind what your Honor's pleasure is on time. Can Mr. Murman finish his opening by noon? If it is close to noon—well, maybe I can break my argument.

The Court: I would like to leave here at 3:30 if I could.

Mr. Murman: We should be able to finish, your Honor.

The Court: I would like to have you finish by 3:30. We will come back at 1:30.

Mr. Murman: That will be agreeable.

The Court: That will give you two hours this afternoon, and I suggest you finish, if you could, your opening statement before noon. [562]

Mr. Murman: Oh, I will, I will.

The Court: Recess five minutes.

(Recess.)

(Thereupon counsel for both sides argued.)

Reporter's certificate attached. [562A]

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

December 30, 1949, at 9:30 A.M.

The Court: The presentation of evidence in this case has been concluded and you have listened to the arguments of counsel. Let me say to you, first of all, that it is your exclusive province to judge the facts of this case. It is the exclusive function of the Court to instruct you as to the applicable law, which, in turn, you will apply to the facts.

I express no opinion as to the facts or the evidence. Nor do I wish you to understand or conclude from anything I may have said during the trial, or in the course of my instructions, that I have intended directly or indirectly to indicate any opinion on my part as to the facts or as to what I think your finding should be. Ladies and gentlemen, you and you alone must decide the facts. In your deliberations you must wholly exclude any sympathy or prejudice from your minds.

Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively is a matter for your thorough and exclusive judgment. A witness is presumed to speak the truth, but this presumption may be negated by the manner in which he testifies, by his motives, or by evidence as to his character and reputation for truth, honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the

whole or any part of their testimony or to discard or reject the whole or any part thereof. If it is shown that a witness has testified falsely on any material matter, you should [2*] distrust his testimony in other particulars, and in that event you are free to reject all of the witness' testimony.

This being a civil action, the plaintiff has the burden of proof. A preponderance of the evidence is sufficient to sustain that burden.

By a preponderance of the evidence is meant that the testimony on behalf of one party has greater weight and has more convincing weight than that of the other party. It does not necessarily depend upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its probable truth or falsity.

In determining the preponderance of evidence, it is your duty to scrutinize carefully the testimony given and in so doing consider the following: the circumstances under which the witness testifies; his or her demeanor and manner on the stand; his or her intelligence; the connection or relationship which he or she bears to either party; the manner in which he or she might be affected by the verdict; the extent to which he or she is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness.

You must disregard entirely any testimony stricken out by the Court or any testimony to which an objection has been sustained.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

The attorneys in their arguments have commented upon and [3] argued upon the facts. If you find any variance between the facts as testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts as testified to by the witnesses.

From time to time counsel for the opposing parties have made objections to questions asked or evidence offered. You must not be prejudiced against any party or his attorney by reason of such objections. Likewise, you must not feel that such objections were made for the purpose of hiding the truth. It is the duty of a lawyer representing a client in court to make such objections as he may think proper and to secure a ruling of the Court thereon. By failing to do this he might waive important legal rights of his client.

If in these instructions any rule or idea be stated in varying ways, as for example, that you are to find for one of the parties if you find certain facts to be true, no emphasis thereon is intended and none must be inferred. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all of the instructions as a whole and regard each in the light of all the others.

Discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure [4] of recollection is a common experience, and innocent misrecollection is not un-

common. It is a fact, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

The defendant Southern Pacific Company is a corporation and as such can act only through its officers and employees who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, as a matter of law, the acts and omissions respectively of the corporation whose agent he is. You are instructed that under the facts of this case the Southern Pacific Company, as the employer, is responsible for the negligence, if any, committed by its employees in the course of their employment.

You have been instructed that a corporation can act only through its servants, agents and employees, and from this it results, so far as this case is concerned, that if there is no negligence on the part of any servant, agent or employee of the defendant Southern Pacific Company, it will be your duty to return your verdict in favor of the defendants.

If evidence for the defendant has been given by its employees, if you find that the testimony of such an employee is not inherently improbable, is uncontradicted, and the employee [5] and his testimony are unimpeached, then you are not at liberty to disregard that testimony solely upon the ground

that it is given by one of defendant's employees. Nor are you to discredit the testimony of an employee solely because you may discredit, if you do discredit, the testimony of some other witness.

In this action for damages for personal injuries plaintiff alleges in Paragraph V of her complaint as follows:

“On or about December 27, 1948, shortly before 8 o'clock a.m. of said day, said Ellis E. Shanahan was operating a certain automobile along Howard Street, a public street and thoroughfare in the vicinity of the tracks and right-of-way of defendant corporation in Anderson, California.

“At about said time and place, defendants so maintained and operated the crossing signal and the warning device of defendant corporation in such a careless, reckless and negligent manner as to cause a certain locomotive and train of defendant corporation, then and there carelessly, recklessly and negligently proceeding in a southerly direction along said tracks and right-of-way, to strike and collide without warning with said automobile, with great force and violence, demolishing said automobile and causing said Ellis E. Shanahan, the operator thereof, to receive and sustain serious bodily injuries, [6] from which injuries said Ellis E. Shanahan died.”

Plaintiff further alleges in her complaint that as a proximate result of the death of said Ellis E.

Shanahan, plaintiff was and has been deprived of the support, maintenance, society and comfort of said deceased, and was and has been thereby damaged, which damages resulted solely and proximately from the carelessness, recklessness and negligence of the defendant Southern Pacific Company.

The defendant Southern Pacific Company alleges in its answer and claims that the death of Ellis E. Shanahan was not caused by any negligence or lack of any ordinary care on its part, or on the part of its agents, or employees, but was due to the carelessness and negligence of the decedent in driving into the path of an oncoming train.

The foregoing is stated to you for the purpose of enlightening you as to the issues of fact, and is not an expression by the Court of an opinion as to the facts.

Every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his or her rights. Everyone is responsible not only for the results of his unlawful acts, but also for an injury occasioned to another by the want of ordinary care or skill in the management of his property or person except insofar as such person as wilfully or by want of ordinary care brought injury upon himself. Every person who suffers injury from the [7] negligent act or omission of another is entitled to recover money therefor in the form of damages.

The gist and gravamen of plaintiff's action is negligence. The plaintiff must prove negligence or there can be no recovery. The defendant, South-

ern Pacific Company, is not an insurer. It is not liable simply because there was an accident and injury, if that was without fault on its part. Nor is it liable simply because there may be some danger in connection with its normal and customary railroad operations. Nor is it enough to show only that if it and its employees had acted in some way different from the way in which they did act, the accident might not have happened. To the contrary, you cannot find against Southern Pacific Company unless the plaintiff proves two things by a preponderance of the evidence: first, that there was negligence in the particulars charged in the complaint; and, second, that such negligence, if any there was, was a proximate cause of the accident. The defendant does not have the burden of proving freedom from negligence. To the contrary, the burden of proving negligence is on the party who charges it, and, in this case, as to any claimed negligence of Southern Pacific Company or its employees, unless the plaintiff sustains the burden of proving it by a preponderance of the evidence, your verdict must be in favor of defendant.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily [8] regulate the conduct of human affairs, would do under the circumstances; or the doing of something which such a person, so guided, would not do under the circumstances. It is always a relative question, relative to the circumstances of the time, of the place, and of the person or persons.

I have also mentioned to you that the plaintiff may not recover unless it is shown that some negligence on the part of the defendant proximately caused the death of her husband. The term "Proximate cause" is defined to mean that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

In considering the claim that the defendant was negligent you will bear in mind that a defendant is liable only for failure to exercise such care as men of ordinary prudence and caution would exercise in the circumstances, and that the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances; that is to say, in the absence of proof, you must take it that a defendant was not negligent. If a defendant was negligent, that is a matter for the plaintiff to prove. If no such proof has been made, the case stands as one of unavoidable accident, for the consequences of which a defendant is not responsible. Sometimes accidents happen and persons are [9] injured where there is no fault on the part of any party involved in the accident. Such accidents are called inevitable or unavoidable accidents. If you find that the accident out of which this case arose was an unavoidable accident, then plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of the defendant.

In a moment of unexpected emergency and imminent danger, a person is not held to the use of the degree of prudence or judgment that one may exercise in an interval of calm where there is time for reflection and deliberation.

You cannot return a verdict against defendant Southern Pacific Company merely because an accident happened and death resulted from it. The mere happening of an accident raises no presumption or inference of negligence on the part of a defendant. The plaintiff has the burden of proving by a preponderance of the evidence that defendant was guilty of negligence which proximately caused the death complained of. In carrying the burden of proof, plaintiff is not aided or assisted by any presumption or inference arising from the mere fact of accident and death. You must not assume or find, merely because it is undisputed, that an accident happened in which Ellis E. Shanahan was killed, that there was negligence on the part of any defendant nor that the defendant is legally responsible for the happening of the accident, or the result of the accident. Negligence of the defendant which was a proximate cause of the accident [10] is an affirmative fact which plaintiff must prove. Unless plaintiff over and above the circumstance that there was an accident and death, has produced evidence of negligence upon the part of defendant which proximately caused the death complained of, your verdict must be in favor of defendant.

Defendant Southern Pacific Company was not re-

quired to exercise the utmost degree of care which the human mind is capable of imagining, nor was it required to exercise a greater degree of care than was required of any individual engaged in the same business. All that was required of defendant was the exercise of ordinary care, such care as an ordinarily prudent person would exercise consistent with the practical operation of the railroad and in the same circumstances. The person whose conduct is set up as a standard by which to measure the conduct of the defendant is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of only ordinary prudence. The law does not demand of defendant exceptional or extraordinary or unusual skill or caution, but requires only ordinary care in conducting its railroad operations at the place where the accident happened. The defendant was not required to take steps against unanticipated eventualities and happenings which were not reasonably to be foreseen.

I instruct you that as a matter of law the rules with reference to the rights and duties of parties in the accident [11] here complained of and in this lawsuit are not, in all respects, those which would apply in the case of a person approaching or crossing the tracks of a street railroad, laid on a street in a city, but, to the contrary, are in some respects distinct, and are rules which the law has worked out as particularly applicable to steam railroads. These rules which are specifically applicable to steam railroads will be given to you in these instructions, but I call to your attention that they are

in some respects different from the rules for street railroads, and this is true both as to the rights and duties of persons approaching or crossing the tracks and as to the rights and duties of the operators of the train.

The operators of the train in question had a right to operate it along the railroad right-of-way and over the crossing. In so operating the train the only duty in respect to operation of the train itself was the duty to give the statutory signals and to exercise ordinary care in the circumstances. In the absence of a showing to the contrary, the law presumes that the operators of the train performed their statutory duties and used such care. This presumption is evidence for the defendant and it remains as evidence in the case until met or overcome by other evidence, if any.

The mere fact, if it be fact, that the railroad operations being carried on at the time and place Ellis E. Shanahan was killed were accompanied by risks and hazards of injury to [12] travelers of the highway, if that is the fact, does not of itself show negligence on the part of defendant Southern Pacific Company. If the defendant performed its statutory duties, exercised ordinary care in the conduct of its business and the operation in question, it was not negligence on its part to engage in and to continue such operations, exercising such care, even in the face of risks, hazards and dangers, if such there were, necessarily and unavoidably inherent in such operations so conducted, and if, as a

result, in such circumstances, and in the course of operations so conducted the operator of an automobile was killed as the result of such a risk, hazard, or danger, responsibility for his death cannot be imposed on defendant Southern Pacific Company on that account.

Where a railroad train is operated toward and over a crossing at which the railroad has protection and at which reasonable warnings of the train's approach are being given, and the warnings are readily discernible by any person approaching or near the tracks and exercising reasonable care for his own safety, the operators of the train are not required to exercise as much care in the operation of the train as they would if the circumstances were the same except that there were no such warnings and no such protection.

The owner and operator of a train is bound to exercise ordinary care in crossing public highways commensurate with the conditions existing and the hazards to be encountered. The [13] maintenance by a railroad company of a signal at a railroad crossing is an invitation to a person approaching the crossing to rely upon the efficient operation of the device. One who exercises ordinary care in giving attention to such a device and who relies upon the operation of the same is not required to use the same amount of caution in looking and listening for an approaching train as is required when no method of warning is provided by the railroad company or when one does not exercise ordinary

care in making use of the protective system that is provided.

As to the railroad crossing in question, you may consider whether the conditions maintained by and the conduct of the defendant Southern Pacific Company at the time of the accident was such as to give to a reasonably prudent person assurance of safety in entering upon the track area and to expressly or impliedly invite the deceased to enter that area without making precautionary observations that one usually should make in approaching and crossing railroad tracks.

If defendant Southern Pacific Company had installed at the crossing where this accident happened an automatic signal so designed as to be actuated by a train which would approach the crossing, and placed and designed to give warning of the approach of such a train, then even if that signal was not operating on the occasion of this accident that fact would not constitute any evidence of negligence on the part of Southern [14] Pacific Company if there is no other evidence of want or care on the part of the Southern Pacific Company. The mere fact that an automatic signalling device fails to work is not of itself any evidence of negligence, and unless over and above that fact the plaintiff introduces evidence of want of care in respect of the device, the mere failure of the device to operate on a particular occasion is no ground for imputing liability to the defendant. Where an automatic crossing warning signal has been installed before

liability can be imposed for failure in its operation, if by a preponderance of the evidence appears that it did in fact fail to operate, the plaintiff must prove that the device was improperly constructed, devised or installed, or that the defendant was negligent in maintaining it, and if it was properly constructed, devised, and installed there was no negligence in its maintenance unless it is shown that it was out of repair and the defendant actually knew it was out of repair, or that it was out of repair and was out of repair for so long that the defendant should have discovered this fact in the exercise of ordinary care, and if the plaintiff fails to prove both of these facts then there is no evidence of any negligence with respect to maintenance of the device.

The law presumes, and the defendant railroad and its employees were entitled to presume and assume, according to the ordinary course of nature and the ordinary habits of life, [15] that a person possessing normal faculties of sight and hearing would see and hear that which was in the range of his sight and hearing. The men conducting the railroad's operations were also entitled to presume and assume, until put on notice to the contrary, if that is the fact, that any person who might be within the possible range of those operations was a person possessing normal faculties of sight and hearing.

In considering the conduct of the men in charge of the railroad locomotive and cars, you must remember that, until put on notice to the contrary,

the railroad men had the right to assume and presume that any person in or moving into the range of the railroad operations would perform the duty which the law imposed, would reasonably exercise all natural faculties of observation and caution, and would not attempt to cross the track in dangerous proximity to an approaching locomotive if the same were so open to view that collision could be avoided if reasonable care were exercised and if the duties imposed by law were performed. Accordingly, in considering this case you must consider the duties which the law imposed upon Ellis E. Shanahan, the driver of the automobile which was driven in front of the approaching railroad train, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the railroad men were entitled to assume would be [16] performed, may have on the claim of negligence on the part of defendant.

You are further instructed that the law of the State of California provides that an appropriate bell must be placed on each locomotive engine and be rung at a distance of at least 80 rods, or 1320 feet, from the place where the railroad crosses any street, road or highway, and that the same must be kept ringing until the locomotive has crossed such street, road or highway. In lieu of a bell, a steam whistle, air siren or an air whistle must be

attached to each locomotive engine and be sounded at a like distance and be kept sounding at intervals until the engine has crossed such street, road or highway. If you find from the evidence that the defendant in this case failed to comply with the foregoing provisions of the law, and that such failure, if any, was the proximate cause of the accident without fault of the part of plaintiff's husband, then you will find the defendant is liable for all damages sustained by the plaintiff and caused by defendant's locomotive, train or cars.

I have instructed you with respect to a statute which provides for the blowing of a whistle or the ringing of a bell when a steam train is approaching a railway crossing. In this regard, I further instruct you that, in order to comply with this statute, it is not necessary for the railroad company to both ring a bell and blow a wistle, but, on the contrary, the doing of either one or the other in compliance with the statute [17] is sufficient, so that if the bell has been rung, as provided in the statute, the whistle need not be blown, and if the whistle has been blown as provided in the statute, the bell need not be rung. If the whistle is used, it need not be sounded continually, but it is only required that it be sounded at intervals. Of course the railroad may, if it so desires, go beyond the terms of the statute and cause both the bell to be rung and the whistle blown.

Under the statute which deals with the sounding of whistle or bell by a steam locomotive, it is

the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. Of this phase of the case the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded, as required by the statute, the fact that it may not have been heard by some person is not ground for finding that the statute was violated, or that the railroad or its employees were negligent.

If as the train was proceeding toward the crossing it sounded the warning of its approach required by the statute, if these warnings were such that they could have been heard by an ordinarily prudent person in the exercise of ordinary care for his own safety, who was within the range of the movement of the train, and if in giving such signals those in charge of the train were exercising ordinary care in the circumstances, then there was no negligence in respect of warnings from the train, [18] and, if the defendant railroad and its employees were free from fault in other respects, defendant is entitled to your verdict.

There is no statute of this State, nor any ordinance, which required that at the time of the accident here in question the railroad crossing be guarded by a human flagman or gates or other barriers or any wig-wag or other warning or protective device. Defendant railroad, however, if it elected to do so, was at liberty to voluntarily to maintain some such protection at the crossing. If it did so, it went beyond the requirements of any ordinance or statute.

There is no statute of this State, nor any ordinance or other rule of any governmental body, fixing or restricting the speed at which Southern Pacific Company may operate its trains on its tracks along its right of way, and over the public highway, at the point at which the accident complained of happened.

In considering the manner of the operation of the railroad train, particularly with respect to speed, one of the matters to be considered is that the defendant railroad was a common carrier and was under a legal duty to provide such train service as would meet the reasonable needs of the general public. In providing such service defendant was under a duty to fix and maintain such schedules as would provide adequate and efficient railroad transportation and to operate at speeds which would enable its trains to meet such schedule, subject to its duty to [19] exercise reasonable care. Accordingly, in considering whether the speed of the train was reasonable and proper, a matter to be taken into consideration is the duty which the railroad owed to the general public to provide adequate and efficient service.

If the locomotive and care were operated toward the point of accident in the usual and customary way, proper warnings were sounded by its locomotive, a look-out was kept by the train crew and the operation was at a reasonable speed, regard being had for all the circumstances then existing, and if in so operating the railroad crew was using the care that ordinarily prudent men would have

the sounding or giving of the warning and not the hearing of it which determines the question of statutory violation. Of this phase of the case the only issue is whether a signal, as required by the statute, was sounded. If a signal was sounded, as required by the statute, the fact that it may not have been heard by some person is not ground for finding that the statute was violated, or that the railroad or its employees were negligent.

If as the train was proceeding toward the crossing it sounded the warning of its approach required by the statute, if these warnings were such that they could have been heard by an ordinarily prudent person in the exercise of ordinary care for his own safety, who was within the range of the movement of the train, and if in giving such signals those in charge of the train were exercising ordinary care in the circumstances, then there was no negligence in respect of warnings from the train, [18] and, if the defendant railroad and its employees were free from fault in other respects, defendant is entitled to your verdict.

There is no statute of this State, nor any ordinance, which required that at the time of the accident here in question the railroad crossing be guarded by a human flagman or gates or other barriers or any wig-wag or other warning or protective device. Defendant railroad, however, if it elected to do so, was at liberty to voluntarily to maintain some such protection at the crossing. If it did so, it went beyond the requirements of any ordinance or statute.

There is no statute of this State, nor any ordinance or other rule of any governmental body, fixing or restricting the speed at which Southern Pacific Company may operate its trains on its tracks along its right of way, and over the public highway, at the point at which the accident complained of happened.

In considering the manner of the operation of the railroad train, particularly with respect to speed, one of the matters to be considered is that the defendant railroad was a common carrier and was under a legal duty to provide such train service as would meet the reasonable needs of the general public. In providing such service defendant was under a duty to fix and maintain such schedules as would provide adequate and efficient railroad transportation and to operate at speeds which would enable its trains to meet such schedule, subject to its duty to [19] exercise reasonable care. Accordingly, in considering whether the speed of the train was reasonable and proper, a matter to be taken into consideration is the duty which the railroad owed to the general public to provide adequate and efficient service.

If the locomotive and care were operated toward the point of accident in the usual and customary way, proper warnings were sounded by its locomotive, a look-out was kept by the train crew and the operation was at a reasonable speed, regard being had for all the circumstances then existing, and if in so operating the railroad crew was using the care that ordinarily prudent men would have

used in the same circumstances, then the full duty to persons within the range of the railroad operations was performed by the railroad men in the handling of the railroad equipment, and if the defendant was free from negligence in other respects, your verdict must be in favor of the defendant.

If as the railroad train was being operated along the tracks and toward the crossing, a motor vehicle was driven toward the track and train, and if, until the vehicle was first seen by the train crew there was no negligence on their part, then, if, when they first saw it, it was so close to the train and was approaching the crossing in such manner that a collision seemed imminent, and the operators of the train were then, and without negligence on their part, confronted with a situation of imminent danger which demanded immediate action, they [20] were required in such circumstances to act only as reasonable men would act in such circumstances of sudden discovery of emergency and danger, and their conduct is not to be tested by what might have been done if there had been time for mature and considered deliberation.

If, as the train was operated toward the crossing where the accident happened, the firemen of the locomotive saw an automobile stop near the crossing, and if when he saw it the automobile was then in a place of safety and, by the exercise of reasonable care on the part of Ellis E. Shanahan in remaining at a stop could have remained clear of the train so that no accident would have occurred, then the mere fact that the automobile was so seen by

the firemen did not impose upon him any duty to warn the engineer or to take steps to slow or to check the speed of the train if the train itself, in view of the surrounding circumstances, was then in plain view and had its headlight burning and if, in such circumstances, the speed of the train was not then checked and no steps were taken to check its speed until the automobile was put in motion, that did not constitute negligence on the part of the defendant.

If as the train was approaching the automobile at which the accident happened and up to the point where the locomotive was so close to the crossing that it could not be stopped or its speed checked so as to avoid a collision the crossing was clear and there was no negligence on the part of the defendant; [21] and if, in such circumstances, an automobile stopped near the crossing was suddenly and unexpectedly driven on to the track and the engine-men then, for the first time, had noticed that an automobile would attempt to cross the track in front of the train and had such notice only after they were so close to the crossing that the locomotive could not be stopped or its speed checked so as to avoid a collision, and if then the enginemen exercised reasonable care to stop the locomotive or check its speed, no liability can be imputed to the defendant because its speed was not checked sooner, and if the defendant was free from negligence in other respects you will return your verdict in favor of the defendant.

If, as the train was operated toward the crossing

reasonable care was exercised in its operation and statutory requirements were obeyed, the locomotive headlight was burning and the locomotive and its headlight were in plain view of Ellis E. Shanahan, the operator of the automobile involved in the accident, then so long as the Shanahan automobile was in a place of safety there was no rule of law which called upon the enginemen to assume that the automobile would leave its place of safety and be driven to one of peril, but to the contrary, in such circumstances, if you so find, if the automobile was at a standstill then until it was started and approached so close to the track that it became apparent to a reasonable person that an accident might happen, the enginemen were entitled to [22] assume that the automobile would remain in a place of safety, clear of the track on which the train was operating and until put on notice to the contrary, they were entitled to act on that assumption even though there was no indication from Ellis E. Shanahan, the operator of the automobile, that he had actual knowledge of the approach of the train.

If there was no negligence in the operation of the train up until the time it could first become apparent to the enginemen operating the train that the automobile operated by the deceased Shanahan might attempt to cross the track in front of the train; and if, as soon as that became apparent, fireman immediately warned the engineer and the enginemen then exercised reasonable care in the handling of the train, no liability can be imputed to the defendant on account of the conduct of the

enginemen, and if the defendant was free from negligence in other respects, your verdict must be in favor of defendant Southern Pacific Company.

Ordinarily the burden of proof rests upon the defendant charging contributory negligence on the part of a plaintiff to prove by a preponderance of the evidence such contributory negligence, the exception being when the testimony offered by or on behalf of such plaintiff shows and establishes such contributory negligence. In other words, the burden of proof as to contributory negligence is met if the same is established by a preponderance of the evidence in the case, regardless of [23] whether such evidence was introduced by plaintiff, or by defendants, or by both.

Contributory negligence is such an act or omission of a person injured, amounting to want of ordinary care in the circumstances of the case as, concurring or cooperating with a negligent act of a defendant, was a proximate cause of the injury complained of. If, in this case, there was any want of care, no matter how slight, on the part of the deceased, Ellis E. Shanahan, amounting to negligence, and if such negligence in any degree proximately contributed to the injury and death of Ellis E. Shanahan, then it makes no difference whether the defendant was guilty of any negligent act or not, you can not compare the negligence of the parties, no recovery can be had, and it will be your duty to return a verdict in favor of defendant.

The deceased automobile driver, Ellis E. Shanahan, was under a continuing duty to exercise rea-

sonable care for his own safety at all times. There is nothing in any of the circumstances of this case which suspended that duty, relieved him of performing it, or excused a violation of it, if any. The defendant owed him no higher duty to look out for his safety than he owed to look out for his own safety, for the degree of care owed by both the automobile operator, Ellis E. Shanahan, and defendant was the same. If the deceased, Ellis E. Shanahan, failed to perform his duty, he was guilty of negligence. [24]

The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of *prima facie* evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof.

You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this

accident were, and what the person injured actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that [25] he exercised care.

Even where there is no statute or ordinance on the subject, it is the rule in respect of the right of way at the railroad crossing that a vehicle or person approaching a steam railroad crossing, with the intention of going over the tracks, is under a duty to yield the right of way at that crossing to any railroad train which may be approaching the crossing. It is not the duty of the railroad train to stop and wait for the person or vehicle to cross, but, to the contrary, it is the duty of the traveler to stop and allow the train to pass if he cannot pass over ahead of it in safety.

You are instructed that a railroad track, the presence of which is known and which is known to be in use for the operation of railroad trains, is itself a warning of danger, without any other sign or signal or warning. It is a warning to persons who have reached years of discretion and who are possessed of ordinary intelligence that it is not safe to cross it without the exercise of constant vigilance, in order to be made aware of the approach of a train, and thus be enabled to avoid receiving injury.

Any person going toward and into a place where he knows there is danger of injury from moving railroad trains, is required to exercise greater vigilance and care than would be required of him in circumstances where danger from moving trains is not reasonably to be anticipated, and if he neglect [26] to exercise any of the vigilance which the situation, in all of these circumstances requires, he is guilty of negligence.

A railroad train which is approaching a crossing and as in plain view of any person intending to use that crossing either by reason of the fact that the train itself is in plain view or by reason of the fact that its headlight is in plain view, is itself a warning of danger to any person within the range of its movement, without any other sign or signal or warning of danger, and any failure to exercise ordinary care to heed that warning constitutes negligence.

If the deceased, Ellis E. Shanahan, in operating the automobile in which he was riding, violated any provision of the Motor Vehicle Code of this state, that constituted negligence on his part, and if there was such negligence which was a proximate cause of his death, your verdict must be in favor of defendant Southern Pacific Company.

If as the deceased, Ellis E. Shanahan, approached the crossing where this accident happened, or while he was in a position at a stop or where he could have stopped clear of the tracks a clearly visible electric or mechanical signal device was giving warning of the immediate approach of the railroad train, and if while such warning was being given he drove on to

the tracks in front of the approaching train and as a result was killed, your verdict must be in favor of defendant Southern Pacific Company. [27]

There has been some evidence in this case with respect to the visibility at the time and place of the accident with which we are now concerned. I instruct you that even if the visibility of the deceased, Ellis E. Shanahan, was impaired by natural conditions, the fact would not excuse any want of care on his part, but, to the contrary, when natural conditions of weather or otherwise impair the visibility of the operator of an automobile who intends to go over a railroad crossing he must exercise care and vigilance commensurate with that situation and must exercise greater care in the use of his other faculties of observation and caution and must exercise greater care in listening for any warning signals of the approach of a train. The care to be exercised by the operator of a motor vehicle in approaching and going over a railroad crossing is not independent of conditions of visibility but, to the contrary, the care and vigilance that he must exercise depends on conditions of visibility to the extent that if the visibility is impaired he must adjust his conduct accordingly and use ordinary care to adjust his conduct to the circumstance of impaired visibility to the end of avoiding collision with any train which may be approaching the crossing.

If the defendant had installed at the crossing where this accident happened an automatic signaling device designed to give warning of the approach

of trains, and if as the deceased approached and attempted to cross the track that signal was [28] not operating, that fact in and of itself is not ground for imposing liability on the defendant, nor would it excuse any negligence on the part of the deceased Shanahan. Even if there were such a signal, and even if it were not working, and the deceased saw that he could not blindly rely on that circumstance alone, and heedlessly and without taking any care for his own safety attempt to cross the track in front of an approaching train and if he did so he was guilty of negligence.

It was the duty of the deceased Shanahan to look and listen before attempting to cross the tracks and to give heed to any warning of the approach of the train, whether from a warning devise installed at the crossing or by whistle or bell of the train, or the headlights of the train, or the train itself, if the same were within the range of his observation; and it was his duty to exercise reasonable care to look and listen for the train, whether warnings of its approach were given or not; and if, before going into the path of the approaching train, whereby the exercise of ordinary care he should and could have learned of the approach of the train in time to avoid it by exercising ordinary care, but failed to do so and a collision resulted, he was guilty of negligence which was the proximate cause of his death and there can be no recovery.

This duty was a continuing duty and continued with the [29] deceased Shanahan as he approached the region of the tracks and as he approached each

track and until he was safely clear of all of the tracks, and if he failed to perform this duty he was guilty of negligence.

If deceased Shanahan was guilty of any want of ordinary care in operating his automobile, such want of care is not excused by any assumption which he might have made that the train would not be negligently operated or that it would be operated in any particular way, or as to speed or signals or otherwise. He was required to exercise reasonable care for his own safety at all times and independently and without regard for the manner of operation of the train, or for the giving or failure to give signals or warnings, if there was any such failure, and any assumption he might make with respect to the possible approach of the train or its operation could not excuse negligence on his part.

If, while the Shanahan automobile was in a place of safety, the deceased Shanahan, by looking and listening, could have learned of the approach of the train in time to have avoided the accident by exercising ordinary care, and in the exercise of ordinary care should have done so but did not, he was guilty of negligence.

Where there was a duty to look and listen for approaching trains it is not discharged by looking and listening at a time or place so removed from the actual crossing of the track [30] that it will not be reasonably effective if there were more available times and places, and where, as in the case of railroad operations, the risk is inherent in the continuing state of things, the duty to exercise reasonable

care is a continuing obligation and it cannot be discharged by looking and listening at a point removed in time and place from the crossing.

If the fixed physical facts of the railroad crossing and the established conditions, as you find them, as to the train and railroad operations, are such that before the accident and while the deceased Shanahan was in a place of safety, if he had looked and listened he must have learned the approach of the train in time to have avoided being struck by it by exercising ordinary care, then you cannot infer that he did use his faculties of observation and caution and did not learn of the approach of the train, and any presumption that he did so is overcome by the facts as you find them.

If, on the occasion of this accident, the windows of the Shanahan automobile were closed or were fogged so that their condition and position interfered with the exercise of the deceased's faculties of observation and caution, that fact, if it be a fact, did not excuse negligence, if any, upon the part of Shanahan, and it was his duty to exercise reasonable care and caution commensurate with all the circumstances and of reasonably to be anticipated dangers.

If his faculties of hearing were interfered with he was required to exercise greater [31] vigilance with his other faculties of observation, and if his sight were interfered with for any reason, he was required to exercise greater vigilance with his faculty of hearing to the end that the care exercised by him would be that of a reasonably prudent person in all the circumstances.

The defendant railroad in engaging in the rail-roading business and in operating the railroad was engaged in a legitimate and lawful business, and in considering the claims made by plaintiff and in suit here, you will bear in mind that the defendant railroad is entitled to the same consideration at your hands as any individual engaged in any other form of business.

In your consideration and determination of this case you must treat it as a litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that the defendant is a railroad or a corporation, nor should you be in any way influenced one way or the other by any thought or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in the consideration of a case of this kind. This case is to be considered and determined by you just as you would consider and determine any litigation between two private individuals.

If, as to whether or not defendant, Southern Pacific Company, or any of its employees, was negligent, or if, as to [32] the second necessary element of plaintiff's case, that is to say, whether or not there was any proximate casual connection between any claimed negligence on the part of the defendant and the accident, you find the evidence evenly balanced, and your own minds in equilibrium, and if, as to such issues, or either of them, you find that you cannot reasonably and fairly determine that the preponderance of the evidence is with the plaintiff,

and accordingly you find that your own minds are in doubt as to which way the preponderance of the evidence lies, then I instruct you, as a matter of law, that in such event plaintiff has failed to make out a case by the preponderance of the evidence which the law requires, you cannot impute liability to the defendant, and it will be your duty to return a verdict against the plaintiff and in favor of defendant.

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the consideration by you of a case of this kind. In making your determination in this case, you cannot in any measure substitute prejudices or feelings or sympathies or passions for the evidence, as the basis of an award. Nor can you make a finding against the defendant based on mere guess, speculation or conjecture. You must make your determination only [33] upon a consideration of the evidence before you, and the instructions which have been given to you by the court. If, upon that evidence, and under the instructions of the court, you find no liability on the part of the defendant, you must return a verdict for the defendant.

You cannot make an award in favor of plaintiff unless you resolve the issue of claimed liability in favor of plaintiff. Unless, upon the whole case, the question of liability is so resolved, plaintiff is not entitled to an award of damages and you must re-

turn your verdict in favor of defendant Southern Pacific Company. If a case of liability has not been made out it is immaterial what other questions have been presented, or what other matters appear in the case, and you will not concern yourselves with them.

If you believe from the evidence, and from the instructions of the court that defendant is not guilty of the negligence charged, then you have no right to compromise the question of defendant's liability and award the plaintiff some amount merely because Ellis E. Shanahan was killed on the occasion in question. If you believe that the defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages. You must, if you so find, return a verdict against the plaintiff and in favor of the defendant.

If you find that the plaintiff's husband did, on the day [34] in question, come to his death as a result of injury proximately caused by the negligence of the defendant, then you are entitled to bring in a verdict in the plaintiff's favor, provided you find that the plaintiff's husband was not at fault which in any way contributed to the accident. If you decide that in favor of the plaintiff, then the next thing you are required to determine is to what, if any, damages plaintiff is entitled. In cases of this sort it is customary for the complaint to allege an amount of damages claimed. There are such allegations in this complaint. These allegations are merely the claim. They are not in any sense evidence or proof, and are not to be taken by you in any sense as evi-

dence or proof of what damages should be awarded, if you award any damages. If you award damages, the amount of damages you must resolve for yourselves, under the instructions which I have given you and which I will give you now, and upon the evidence which has been introduced.

I will now instruct you upon the measure of damages. You are not to assume from the fact you are instructed on the measure of damages, and the court by so instructing you does not intend to convey the idea to you, or to tell you, that you should award damages to the plaintiff in this case. You have been instructed on the measure of damages not because the court feels that the plaintiff in this case is entitled to damages, but because the court in cases such as this instructs [35] on all of the issues made by the pleadings, including the issue of damages.

If, under the court's instructions, you find that the plaintiff Nelda Shanahan is entitled to a verdict, you will award such sum as under all the circumstances of the case may be just compensation for the pecuniary loss she has suffered by reason of the death of her husband, Ellis E. Shanahan.

The testimony shows that at the time of the death of Ellis E. Shanahan he was 55 years of age, while the plaintiff, his wife, was 43 years of age. According to the United States Life Tables issued by the United States Department of Commerce, the expectancy life of a man aged 55 years is 18.34 years. The expectancy of life of a woman aged 43 years is 30.62 years. These facts of which the court takes

judicial notice are now in evidence to be considered by you in arriving at the amount of damages, if you find that the plaintiff is entitled to a verdict. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probably average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables referred to this applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you [36] should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the persons whose life expectancies are in question.

In determining that pecuniary loss, if any, plaintiff Nelda Shanahan suffered by reason of the death of her husband, you may consider the financial support which plaintiff would have received from the deceased except for his death, together with pecuniary value of the society, comfort, care, protection and right to receive support, if any, which plaintiff lost by reason of her husband's death. In weighing these matters you may consider the age of the deceased and of the plaintiff; the state of health and the physical condition of the deceased and of the plaintiff as it existed at the time of the death and immediately prior thereto; their station in life; their

respective expectancies of life as shown by the evidence, the disposition of the deceased, whether it was kindly, affectionate, or otherwise; whether or not he showed an inclination to contribute to the support of the plaintiff in light of the earning capacity of the deceased; such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection which the plaintiff reasonably might have expected to receive from the deceased had he lived.

In considering damages in a case of this character, you [37] are reminded that pecuniary loss is not based solely on the legal right to support, but may be based as well on a deprivation of benefits during the lifetime of deceased which, from all circumstances in evidence, it could be reasonably expected that the plaintiff would have received.

If you find that the plaintiff is entitled to recover and if you should find that she paid out any sum, or incurred liability for funeral services in memory of the deceased or for the burial of his body, you shall include in your award an amount that will compensate plaintiff for whatever reasonable expense was paid out or incurred by the plaintiff for those purposes.

The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, and even if one or both of those conditions have existed, the mere right to receive support may have a pecuniary value and that may be the basis of assessing damages against

one who negligently has caused the death of the person from whom the support was due.

If you should return a verdict in favor of the plaintiff, but then in fixing the amount of recovery you must bear in mind that a defendant is just as much entitled to your consideration as is a plaintiff; that a defendant is entitled to protection at your hands against any unjust or unreasonable demand, and if you make an award in favor of the plaintiff it [38] will be your duty to see to it that such award does not exceed what the plaintiff is, in law and in fact, entitled to recover. I further instruct you that the burden of proof as to the amount of plaintiff's damage is upon the plaintiff, just as is the burden of proof of every other affirmative allegation of plaintiff's complaint.

If damages are awarded, the only amount which you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not in any event exceed what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiff or punishment or penalty to the defendant. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

If you should return a verdict for the plaintiff, then, in fixing the amount of your award, and in arriving at a pecuniary loss, if any, suffered, one of the elements is prospective loss of contributions

from the deceased, if any. If there is such loss, in making allowance for it, it will be improper to award the full principal amount of such prospective contributions—that is to say, it will be improper for you to attempt to arrive at this amount by multiplying the prospective yearly contributions by the number of years for which they would be enjoyed. To the contrary, if plaintiff is [39] entitled to anything for such loss, she would be entitled only to the present value of worth of such contributions.

In computing the present value or worth you must make adequate allowance for the earning power of money. In determining the present value the calculation must be made on the basis of the award bearing interest at the highest net rate of interest that can be had on money safely invested.

The present value or worth of a sum or sums to be received in the future is an amount of money such that the amount itself, if invested, at the highest net rate of interest that can be had on money safely invested, will, by resorting both to the principal sum and the income so calculated, produce the sum or sums that would have been received in the future at the time the same would be received and will do this not from the income alone but by use of both the income and the principal sum so that at the end of the period for which allowance is made, nothing will remain.

Where an action is brought on account of the death of a person, such action is solely for the purpose of compensating for the pecuniary loss, if any,

suffered by reason of the death. Accordingly, if you should return a verdict for the plaintiff, your award must be restricted to such an amount as will reasonably compensate for any pecuniary loss suffered, and for that alone, and the burden of proving pecuniary loss is upon the plaintiff. There can be no substantial recovery [40] on behalf of a person who has not suffered substantial pecuniary loss. The action is not for the loss of an object of love and affection, and the law does not recognize the loss of an object of love and affection as a ground for allowing damages, but we fix recovery to pecuniary and financial loss. Nothing can be allowed on account of any sentimental value which may have attached to the life which has been lost.

Your determination of this case, ladies and gentlemen, must be a judicial determination. In determining the question of liability you must not permit yourselves to be influenced, consciously or unconsciously, by the season of the year, the personal situation of the plaintiff, or sorrow which she may have been caused. You must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. It is entirely natural to sympathize with and feel sorry for a woman who has lost her husband. Such feelings, in themselves, are entirely proper at the proper time and place, but such feelings have no just place in the consideration by you of this case. You must not in any measure substitute prejudice or feeling or sympathy for evidence as the basis of an award. Nor

can you make a finding against the defendant based on mere guess, speculation or conjecture or against the preponderance of the evidence. You must base your determination in this case solely upon the judicious consideration of the evidence and the instructions given to you by the Court. If [41] upon the evidence and under the assumption there is no liability on the part of the defendant railroad, your verdict must be for the defendant.

Now, ladies and gentlemen, if you can conscientiously do so you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the evidence is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper for you to adhere to your own view if, after a full exchange of ideas, you still believe you are right.

If you should find in favor of plaintiff in this case, you should not, in arriving at the amount of your verdict, resort to the so-called pooling plan or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then to add up the total and divide by twelve and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon chance.

I finally caution you that if it becomes necessary for the Jury to communicate with the Court during its deliberations, or upon its return to the Court,

respecting any matter connected with the trial of this case, you should not indicate to the Court in any manner how the Jury stands numerically or otherwise on the issues involved. This caution the jurors should observe at all times after the case is submitted to it and [42] until the Jury has reached a verdict.

Whenever all of you agree to a verdict, it is the verdict of the Jury. In other words, your verdict must be unanimous. When you retire to the Jury room to deliberate, you will select one of your number as foreman or forelady and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this cause in this Court.

I have here two forms of verdict, and in presenting these forms to you, telling you what they are, I am not suggesting in any manner what your verdict shall be. The first form is the form that you should sign if you find in favor of the defendant. It has the title of the Court and cause and the word "verdict" on it, and says, "We, the Jury, find favor of the Defendant," and is signed by the foreman in case you find in favor of the defendant.

If you find in favor of the Plaintiff, then you should sign the other form which says, "We, the Jury, find in favor of the Plaintiff, assess damages against the Defendant in the sum of blank dollars." You should fill in the amount found, if you find any damages and find in favor of the Plaintiff, and then have that signed by your foreman.

Now, are there any exceptions?

Mr. Murman: Yes, your Honor.

The Court: Well, if there are going to be exceptions to the [43] instructions, I think I will allow the Jury to be taken out until we hear them.

Mr. Murman: I think I am entitled to make them in the presence of the Jury, your Honor.

The Court: What?

Mr. Murman: My understanding is that I am entitled to make the exception in the presence of the Jury when they bear on the instructions of the Court, to state my——

The Court: I think not. I think I will let the Jury go out, and then they will be recalled and I will give them the forms of verdict and submit it for their consideration.

Ladies and gentlemen, the attorneys in this case now want to make certain comments with respect to my instructions, so accordingly I would like to have you go to the Jury room until called back when I will finally submit the case to you.

(Thereupon the Jury left the courtroom, and the following proceedings were had outside the presence of the Jury.)

Mr. Murman: May the records show, your Honor, I except to the Court's refusal to permit me to make the exceptions in the presence of the Jury?

The Court: Yes, it will so show.

Mr. Murman: The first exception I wish to make, your Honor, is that I do not think I heard

your Honor instruct on direct and circumstantial evidence, which was one of the instructions that I requested to be given by the Court as from its usual instructions on that [44] subject. I may be in error on that, but I think I did not hear your Honor instruct on direct and circumstantial evidence, and I have reference, your Honor, in making that request, to B.A.J.I. instruction 27.

The second exception is to the giving of defendant's instruction number 43. That instruction I think would be proper if we were considering the case of a living plaintiff who had suffered personal injuries. However, as I understand the California law, and as the Court, in my opinion, properly, instructed the Jury when the Court gave plaintiff's proposed instruction number 8, that Mr. Shanahan in his conduct at the time and immediately preceding the accident in question was exercising ordinary care and was obeying the law is a presumption that does stand in the face of testimony which overcomes it. Your Honor has instructed to the contrary, that such presumption can not stand. There are cases from the Smellie case on down which hold such presumption is evidence and does stand, and hence that the Jury must consider it together with all other evidence in the case. If it is their opinion that the other evidence overcomes it, that is one thing, but to instruct that the presumption can not stand in face of testimony which overcomes it I submit is erroneous. The remaining passage in that if it has been overcome by testimony it passes out of the case,

that is not the holding of the Smellie case or subsequent cases.

This, also: "Presumption exists only in the absence of proof [45] of the facts." That is not a proper statement of the law, in my opinion.

In regard to the latter part of instruction number 43, where it is set forth that, "If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did——." There is the crux of the cause. It isn't a question of a person being injured, it is the question of a person being killed—— "Then you must determine whether or not the exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised." That is not correct. "If you find the actual fact as to what the person who was injured——" again we have the "injured" and not "killed" problem—— "There is no room for any presumption as to what he did or for any presumption that he exercised care."

In my judgment that instruction is clearly erroneous and contrary to law.

I take exception to your Honor's giving instruction number 49 in this respect, that there is no evidence in this case that the deceased violated any provision of the Motor Vehicle Law; no such evidence in the case at all. To give any instruction on that subject which would indicate that had there

been a violation and such would have been a proximate cause of his [46] death the verdict must be in favor of the defendant is erroneous.

Also, in Section No. 9 offered by the defendant, has no bearing on the issues in this case. There is no evidence as to what the duties of the deceased would have been had he crossed the track of a street railway, or approached the track of a street railway, and consequently there is no reason to have given that instruction, and to have indicated to the Jury that there may have been some different rule of conduct in connection with steam railroads, as we were only concerned with steam railroads there was no need for an instruction by the Court discussing street railroads.

I respectfully submit those exceptions to the Court.

The Court: I will agree that I didn't notice that I omitted the instruction with respect to circumstantial evidence, and I will give that when the Jury returns.

Mr. Murman: Yes, your Honor,

The Court: The other exceptions will be overruled.

Mr. Phelps: May it please the Court, your Honor understands that this is the part of the case which certainly I dislike most, but I want to state the defendant's position on the instructions, if your Honor please, first, as to the giving of certain of plaintiff's proposed instructions.

Contrary to what Mr. Murman would contend, it

had been our position in the case that the presumption of due care is dispelled as a matter of law, and to preserve that position, if [47] your Honor please, we respectfully except to the giving of Plaintiff's proposed instruction number 8, which would tell the Jury that the presumption was in the case, and the exception is on the ground that, as a matter of law, there is no room for any presumption that deceased exercised ordinary care.

Then, if your Honor please, we respectfully except to the giving of Plaintiff's proposed instruction number 4. First, that instruction, if your Honor please, "The maintenance by a railroad company of a signal at a railroad crossing is an invitation to a person approaching the crossing to rely——." As to the use of the word "invitation," if your Honor please, we submit, and on the ground except, that it is not an invitation; and at best, if your Honor please, it would be a question of fact whether or not it was an invitation, only that instruction in its form instructs as a matter of law that it is an invitation, and it doesn't even represent it as a question of fact. I appreciate that is an instruction drawn by plaintiff's counsel.

Next, in the same instruction, I note that the last sentence goes on to read that, "one who exercises ordinary care in giving attention to such a device, and who relies upon the operation of the same is not required to use the same amount of caution in looking and listening for an approaching train as is required when no method of warning * * *," and so

forth. That instruction is erroneous in this respect, in that if the [48] signal is working—it doesn't include that fact in the statement, but contrary to what the instruction says, a person approaching the crossing would be required to exercise more care rather than less. Finally, if your Honor please, in the same sentence of that instruction number 4, it uses the words, "when one does not exercise ordinary care in making use of the protective system that is provided." I submit that that is ambiguous and uncertain as to who the "one" is, and it could be and is misleading in that respect.

Now, we respectfully except to the giving of Plaintiff's instruction number 5 which states no proposition of law whatsoever, and which ignores the fact that deceased could be guilty of contributory negligence.

I respectfully except to the giving of Plaintiff's proposed instruction number 7, which had to do with a moment of unexpected emergency and which entirely eliminates the possibility of antecedent negligence on his part, couldn't apply, if your Honor please, if there were any antecedent negligence on the part of the deceased.

Then, if your Honor please, in Plaintiff's proposed instruction number 11 your Honor instructed the Jury with respect to the life expectancy of Mr. Shanahan. We submit that that was improper, that the only instruction in that regard should have been in the form of the stipulation heretofore had when that matter came up. [49]

On the question of damages, Plaintiff's proposed instruction number 13, to which we respectfully except, refers to benefits and states that damages can be awarded for deprivation of benefits without stating that they must be of pecuniary value only.

If your honor please, so much for the Plaintiff's instructions, except instruction number 12, which says that they may consider the inclination to contribute. I thought there, your Honor, it isn't an inclination to contribute, but the fact of contribution, that is important.

Then to the refusal to give defendant's proposed instructions number 25 and number 26 on the point, if your Honor please, of negative testimony. In this case I think that is particularly important in view of the fact that there was a direct issue as to whether or not the wigwag was out, and the Jury would have been told by those instructions the effect of that negative testimony.

Then, if your Honor please, our position with respect to speed was that, as a matter of law, the Jury should have been instructed it was not negligence as a matter of law. Your Honor gave other instructions, but I would like to except to the refusal to give Defendant's instruction number 29.

If your Honor please, Defendant's instruction number 46, that one dealing with absentmindedness and forgetfulness, I think in this case it is particularly apt because if plaintiff's [50] husband was day-dreaming and preoccupied, that would be one possible theory that the Jury might think that he was

preoccupied or absentminded and that that was one theory on which they might excuse his conduct. This would have told the Jury that that was not an excuse under the circumstances stated in the instructions.

Then, if your Honor please, again and only to preserve the point, with respect to the presumption we respectfully except to the refusal to give Defendant's Instruction number 55 dealing with presumption, and the citation I believe is correct and that is in the instruction.

Then finally, if your honor please, Defendant's instruction number 62, which, if your Honor please, would have told the Jury along the same line, that to the contrary that instead of there being a presumption of due care, if the facts were such as stated in the instruction, then there was presumption that he did not take due care.

And finally instruction 63 along the same line, and, if your Honor please, that one places and states the dilemma that I believe the cases support, that the deceased must have found himself in, that either he looked and did not see, or having looked did not look carefully, and that dilemma stated in that instruction is supported by the cases.

I respectfully except on those grounds.

The Court: I will also deny the motion of the defendant on [51] the various instructions. Will you bring the Jury back in? In the meantime, I am going to leave the bench and get an instruction on circumstantial evidence.

(Thereupon the Jury resumed their places in the jury box and the following proceedings were had.)

The Court: Ladies and gentlemen, my attention has been called to the fact that I failed to give you this instruction, which I should have; that is, an instruction with reference to direct and indirect evidence, and it is as follows:

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if proved, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, although true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts, unless declared by law to be conclusive, it may be contraverted by other evidence, direct or indirect; but unless so contraverted the Jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the Jury draws from the facts proved. It must be founded on a fact or [52]facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of

the person whose act is in question, the course of business or the course of nature.

That instruction, ladies and gentlemen, you are to consider together with all those that I have heretofore given you. I now ask you to go back to the Jury room and deliberate upon your verdict in this case.

(Thereupon the Jury retired to the Jury room.)

Mr. Phelps: May it please the Court, I think the record already reflects this, but I want to make sure that it does, that so far as the defendant Southern Pacific Company is concerned our position is that we should have liked and did request that the objections to the instructions be made out of the presence of the Jury. I have number 51 in mind, which provides objections shall be made out of the presence of the Jury.

The Court: The record will show that you asked that the objections to the instructions be given out of the presence of the Jury and that your request was granted.

Mr. Phelps: Thank you.

The Court: In opposition to Mr. Murman.

Mr. Phelps: Yes.

Certificate of Reporter attached.

[Endorsed]: Filed January 24, 1950. [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled cause, and that they constitute the record on appeal herein, as designated by the appellant, to wit:

Complaint.

Answer to Complaint.

Demand For Trial By Jury.

Minute Order of July 18, 1949—Order Setting for Trial.

Minute Order of December 19, 1949—Trial, Jury Impaneled.

Minute Order of December 21, 1949—Further Trial.

Minute Order of December 22, 1949—Further Trial, Motion For Directed Verdict Denied.

Minute Order of December 27, 1949—Further Trial, Motion For Mistrial Denied.

Minute Order of December 28, 1949—Further Trial.

Minute Order of December 29, 1949—Further Trial, Motion For Directed Verdict Denied.

Verdict.

Minute Order of December 30, 1949—Further Trial, Verdict.

Judgment On Verdict.

Notice Of Judgment On Verdict.

Notice Of Motion For New Trial.

Motion For New Trial.

Minute Order of February 23, 1950—Motion For A New Trial Continued.

Minute Order of March 15, 1950—Hearing Of Plaintiff's Motion For A New Trial, Ordered Briefs Submitted, Motion Continued.

Minute Order of April 21, 1950—Plaintiff's Motion For A New Trial Submitted.

Minute Order of April 28, 1950—Plaintiff's Motion For A New Trial Denied.

Notice Of Denial Of Motion For New Trial.

Notice Of Appeal To United States Court of Appeals.

Cost Bond On Appeal.

Designation Of Record On Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Defendant's Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O and P.

Reporter's Transcript (Partial) for December 19, 1949—Argument on Motion for Continuance.

Reporter's Transcripts—Vol I for December 21, 1949, Vol. II for December 22, 1949, Vol. III for December 27, 1949, Vol. IV for December 28, 1949, Vol. V for December 29, 1949.

Reporter's Transcript for December 30, 1949—Instructions To The Jury.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of June, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed] No. 12593. United States Court of Appeals for the Ninth Circuit. Nelda Shanahan, Appellant vs. Southern Pacific Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 28, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
The Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12593

NELDA SHANAHAN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, et al.,

Respondents.

DESIGNATION OF NECESSARY RECORD
AND STATEMENT OF POINTS RELIED ON

Appellant hereby designates certain portions of the record as being necessary for the consideration of the following points relied on and concisely stated pursuant to rule 19(6) of the Court:

I.

In this wrongful death action arising out of a grade crossing accident, the trial court erred in instructing the jury on the presumption of ordinary care, clothing the deceased, as follows:

“You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually

did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was injured did, there is no room for any presumption as to what he did or for any presumption that he exercised care.”

II.

The trial court erred in giving repetitious formula instructions to the jury directing the jury to find against plaintiff or for defendant.

III.

The trial court erred in giving numerous repetitious and conflicting instructions to the jury regarding the rights of the parties as to the grade crossing in question.

IV.

The trial court erred in striking certain testimony of plaintiff's rebuttal witness Tolson and instructing the jury to disregard the testimony as neither rebuttal or impeachment.

V.

The trial court erred in denying plaintiff's motion for an order setting aside the verdict and judgment entered thereon and for a new trial specifically as to the following grounds:

1. Orders of the court by which plaintiff was prevented from having a fair trial.

2. Abuse of discretion by which plaintiff was prevented from having a fair trial.

3. Errors in law occurring at the trial and excepted to by the plaintiff.

4. Errors in the court's instructions.

5. Verdict for the defendant is contrary to law and against the evidence.

Appellant designates the following portions of the record as being necessary for the consideration of the above points:

1. Complaint.

2. Answer.

3. All testimony of witnesses produced on behalf of appellant as contained in the Reporter's Transcript.

4. The testimony of Witness Rowe produced on behalf of respondent.

5. All of the court's instructions to the jury.

6. Verdict of the jury rendered December 30, 1949.

7. Entry of judgment on verdict on January 3, 1950, together with notice thereof of even date.

8. Motion for new trial filed January 9, 1950.

9. Order of April 28, 1950, denying motion for new trial together with notice thereof dated May 1, 1950.

10. Notice of appeal to the United States Court of Appeals dated May 22, 1950.

11. Undertaking for Costs on Appeal.

Dated: July 3rd, 1950.

/s/ DAN HADSELL,

/s/ SYDNEY P. MURMAN,

HADSELL, SWEET, INGALLS
AND MURMAN,

Attorneys for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 3, 1950.